87-1855

Supreme Court, U.S.
FILED
MAY 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87 -

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

LeRoy S. Zimmerman
Attorney General

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

Gregory R. Neuhauser
Senior Deputy Attorney General

Maria Parisi Vickers
Chief Deputy Attorney General
Chief, Eastern Region
Counsel of Record

Attorneys for Petitioners

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

LIST OF PARTIES

PETITIONER

THOMAS K. GILHOOL, Secretary of Education of the Commonwealth of Pennsylvania

RESPONDENTS

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH

THE CENTRAL BUCKS SCHOOL DISTRICT

DR. THOMAS L. NEWMAN, Superintendent of the School District

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISION INVOLVED	4
STATUTE INVOLVED	6
STATEMENT OF THE CASE	13
REASONS FOR GRANTING THE WRIT	
1. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE EDUCATION FOR ALL HANDICAPPED ACT CONTAINS LANGUAGE WHICH CONVEYS CONGRESS' CLEAR INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY	23

PAGE

2. THE DECISION OF THE THIRD CIRCUIT, BASED ON AN ERRONEOUS INTERPRETATION OF THE EHA, WOULD GRAVELY DISRUPT EDUCATION FOR THE HANDICAPPED IN PENNSYLVANIA TO THE DISADVANTAGE OF THE HANDICAPPED 41

CONCLUSION 54

APPENDIX:

Opinion of the United States Court of Appeals for the Third Circuit 1a

Opinion of the District Court for the Eastern District of Pennsylvania, June 2, 1986 ..... 83a

Opinion of the District Court for the Eastern District of Pennsylvania, August 28, 1986 ..... 112a

Opinion of the District Court for the Eastern District of Pennsylvania, February 20, 1987 ..... 191a

TABLE OF AUTHORITIES

CASES	PAGE
Alabama v. Pugh, 438 U.S. 781 (1978)	24
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	23
Board of Education of Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176, 183 (1982)	42, 45, 47
Brandon v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740 (1984)	51
Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983)...	49
David D. v. Darmouth School Committee, 775 F.2d 411 (1st Cir. 1985)..	33, 34
Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986)..	36
Edelman v. Jordan, 415 U.S. 651, 667 (1974)	23, 24, 25, 26

PAGE

Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973) 24

Ex Parte Young, 209 U.S. 123 (1908) 25

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976) 26

Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005, 1020 (1985) .. 29

Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986) .. 36

Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) .. 48

Hans v. Louisiana, 134 U.S. 1 (1890) 24

Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291, cert. denied 455 U.S. 946 (1982) 49

Honig v. John Doe, 56 U.S.L.W. 4091, 4096 (U.S. 1988) 42

PAGE

Hutto v. Finney,
437 U.S. 678, 693 (1978) 38

Miener v. State of Missouri,
673 F.2d 969 (8th Cir.
1982), cert. denied,
459 U.S. 909 (1983) 34, 35

Mills v. Board of
Education of the District
of Columbia,
348 F.Supp. 866
(D.C. D.C. 1972) 42

Parden v. Terminal R. Co.,
377 U.S. 184 (1964) 24, 26

Pennhurst State School
and Hospital v. Halderman,
465 U.S. 89 (1984) 23, 24,
25

Pennsylvania Association
for Retarded Children v.
Commonwealth of Pennsylvania,
343 F.Supp. 279
(E.D. Pa. 1972) 42

Quern v. Jordan,
440 U.S. 332, 345 (1979) 26, 35

Robert M. v. Benton,
634 F.2d 1139,
1142 (8th Cir. 1980) 50

PAGE

Victoria L. by Carol A. v.
District School Board,
471 F.2d 369 (11th Cir. 1984) .. 51

Vogel v. School Board of Montrose,
491 F.Supp. 989
(W.D. Missouri) 50

Welch v. State Department
of Highways and Public
Transportation,
___ U.S. ___, 107 S.Ct.
2941 (1987) 23

Withrow v. Larking,
421 U.S. 35, 47 (1975) 52

Wood v. Strickland,
420 U.S. 308, 315 (1975) 38

STATUTES	PAGE
Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, §1003(a)(1) (1986)	39
20 U.S.C. §1400(b)(9)	6, 31
20 U.S.C. §1401, et seq.	13, 34
20 U.S.C. §1412(6)	46
20 U.S.C. §1415(a)	6
20 U.S.C. §1415(b)	7
20 U.S.C. §1415(c)	9, 21, 41
20 U.S.C. §1415(d)	10
20 U.S.C. §1415(e)	11, 32 37
28 U.S.C. §1254(1)	3
29 U.S.C. §974	28
42 U.S.C. §1983	27
42 U.S.C. §1988	38
42 Pa.Cons.Stat. §8521(b)	24
71 P.S. §67.1(d)(1)	49

CONSTITUTIONAL PROVISIONS	PAGE
U.S. Const. Amend. XI	4
U.S. Const. Amend. XIV, Sec. 1	4
Sec. 5	5

NO. 87 -

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Thomas K. Gilhool, Secretary of the Pennsylvania Department of Education, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported but may be found in the appendix. (Pet. App. 1a).

The District Court opinion of June 2, 1986 is reported at 646 F.Supp. 280 (E.D. Pa. 1986) and may be found in the appendix. (Pet. App. 83a).

The District Court opinion of August 28, 1986 has not been reported but may be found in the appendix. (Pet. App. 112a).

The District Court opinion of February 20, 1987 has not been reported but may be found in the appendix. (Pet. App. 191a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on January 29, 1988. (Pet. App. 1a). This petition is filed within ninety days of that date. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ...

U.S. Const. Amend. XIV, Sec. 1.

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV, Sec. 5.

STATUTE INVOLVED

20 U.S.C. §1400. Congressional Statements and Declarations

...

(b) Findings

The Congress finds that -

...

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

§1415. Procedural Safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall

establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to -

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State,

including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit -

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational

unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction;
attorneys fees

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the

records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

...

(4)(G) The provisions of subparagraph (F) [describing situations when the court shall reduce attorneys fees awarded under this section] shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

STATEMENT OF THE CASE

1. This case arises out of a dispute over the appropriate educational program for a gifted handicapped child. Respondent Russell A. Muth, Jr., alleged that his son, Robert Alexander Muth ["Alexander"], was denied a "free, appropriate public education" in violation of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq. (the "Act" or "EHA"). (Pet. App. 141a).

The defendants were the Pennsylvania Secretary of Education;[1] the Central Bucks (Pennsylvania) School District,

---

[1]The original defendant was Secretary Robert C. Wilburn, sued only in his official capacity. His current successor in office is Thomas K. Gilhool, the petitioner in this Court.

and Dr. Thomas L. Newman, Superintendent of the School District. (Pet. App. 1a-8a).

2. Alexander, already diagnosed as learning disabled, first enrolled in the Central Bucks School District in 1980 where an individualized educational program [IEP] placed him in a learning disability resource room for some subjects and mainstreamed, or placed him in regular classes, for other subjects. Changes in Alexander's IEP were made with Muth's participation and approval until June 1983 when the School District proposed a change in Alexander's 1983-84 IEP to return the child to the learning disabled classroom setting for all substantive subjects. (Pet. App. 9a-11a).

Muth disagreed with the School District's proposal, requested a due process hearing and requested that no change be made in Alexander's current placement until a hearing was held. In September 1983, Muth enrolled Alexander in a private school in Massachusetts for learning disabled students.[2] (Pet. App. 13a).

The due process hearing was held on September 30, 1983 before a hearing officer who, on October 31, 1983 made recommendations, which included changes

---

[2]Alexander remained at that private school until April 1985 when he was transferred by his father to Wyncote Academy, a private school in Pennsylvania with no special education program. At the beginning of the academic year 1986-87, Alexander returned to the Central Bucks School District.

in the IEP proposed by the School District, but did not order that Alexander be placed in a private school as Muth had requested. Both Muth and the School District appealed the hearing officer's decision to the Secretary of Education who remanded the case to the hearing officer with instructions to the School District to revise the IEP. The revised IEP was presented to the hearing officer, but Muth raised objections and on July 25, 1984 the hearing officer decided that the modified IEP was an appropriate program of education for Alexander.

Muth's appeal to the Secretary followed, and on October 24, 1984 the Secretary affirmed the hearing officer's decision. While these administrative proceedings were underway, Muth filed

suit in federal district court. (Pet. App. 13a-17a).

3. In the district court, Muth claimed that the IEP proposed by the School District for 1983-84 would not have provided Alexander with an appropriate education and that the administrative procedures adopted by Pennsylvania for contesting an IEP did not comply with the Act. He sought tuition reimbursement, declaratory and injunctive relief and attorneys fees. The district court initially held that the Eleventh Amendment barred Muth's claim for monetary relief against the Secretary of Education, but left open the question of injunctive relief and the question of monetary relief against the remaining defendants. (Pet. App. 167a).

By memorandum opinion and order of June 2, 1986, the District Court held that Pennsylvania's statutory scheme for providing parents of handicapped children with administrative process violates the provisions of the EHA. More specifically, the District Court held:

> (1) that Pennsylvania's initial hearing and review are both conducted at the state level in contravention of federal law, (Pet. App. 90a-95a);
>
> (2) that even if the initial hearing were a local one, a remand by the Secretary to the hearing officer violates the finality requirement of federal law, (Pet. App. 102a-104a); and
>
> (3) that because the Secretary must be considered an employee of Pennsylvania's state educational agency, he is an improper reviewing officer under federal law. (Pet. App. 101a-102a).

The District Court did not resolve the issue of tuition reimbursement, stating that it would hold a hearing to determine whether the IEP which the school district had proposed would have provided the minor child with an appropriate free education. (Pet. App. 108a). Prior to trial, the district court advised the Secretary that it would reconsider whether the Eleventh Amendment presents a jurisdictional bar to an award of money damages against the Secretary.

4. After a bench trial, the District Court issued an opinion and order on August 28, 1986, holding that the IEP prepared by the School District for the 1983-84 school year would have afforded Muth's son an appropriate education. (Pet. App. 156a) However, in light of the procedural violations

previously found, and without any finding of substantive due process deprivations, the District Court held that Muth was entitled to reimbursement for one year's private school expenses for his handicapped child. (Pet. App. 166a). The District Court further held that the EHA abrogated the Eleventh Amendment immunity of the states; consequently, the Secretary, sued in his official capacity, was found to be jointly and severally liable with the School District for the reimbursement award made to Muth. (Pet. App. 174a-177a; 187a-188a). In an opinion filed on February 20, 1986, the District Court awarded Muth attorney's fees to be paid jointly by the Secretary and the School District. (Pet. App. 210a-212a).

5. The parties cross-appealed to the Court of Appeals for the Third Circuit, which affirmed the District

Court in relevant part. (Pet. App. 4a-5a). More particularly, the Court of Appeals held: (1) that the Secretary of Education is an "employee" of an agency involved in the education of the child and thus is precluded, by the provisions of 20 U.S.C. §1415(c), from deciding administrative appeals involving issues of special education placements (Pet. App. 49a); and (2) that the EHA abrogated the states' Eleventh Amendment immunity.[3] (Pet. App. 77a-78a).

---

[3]The Court of Appeals affirmed the District Court's holdings that the child's IEP was appropriate, and that remand from the Secretary to the hearing examiner violates the finality requirement of 20 U.S.C. §1415(c), but saw no need to reach the issue whether Pennsylvania's two-step hearing and review procedure conforms to federal law. These issues are not raised here. (Pet. App. 49a-58a).

The Secretary's petition for rehearing en banc was denied. He seeks review from this Court on the issues of the Eleventh Amendment and the bar to his hearing special education appeals under the EHA.

REASONS FOR GRANTING THE WRIT

1. THE PETITION SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO WHETHER THE EDUCATION FOR ALL HANDICAPPED ACT CONTAINS LANGUAGE WHICH CONVEYS CONGRESS' CLEAR INTENT TO ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

In a long line of cases, this Court consistently has interpreted the Eleventh Amendment to preclude suits against a state in federal court by citizens of that state or other states. Welch v. State Department of Highways and Public Transportation, ___ U.S. ___, 107 S.Ct. 2941 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651, (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279

(1973); Parden v. Terminal R. Co., 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman v. Jordan, supra, as well as suits seeking equitable relief, Alabama v. Pugh, 438 U.S. 781 (1978). A state may consent to suit against it in federal court, thereby waiving its immunity, but Pennsylvania has specifically withheld consent. 42 Pa.Cons.Stat. §8521(b); Pennhurst, 465 U.S. at 103 n. 12. In the absence of consent, a suit against the state or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 465 U.S. at 100.

Moreover, the Eleventh Amendment is a complete bar to suit against a Commonwealth of Pennsylvania official who is sued, as the Secretary of Education is sued here, in his official capacity. Ex Parte Young, 209 U.S. 123 (1908). Although this Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 465 U.S. at 104 n. 13,[4] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. at 666-667.

a) In this case, the Court of Appeals for the Third Circuit has misapplied the decisions of this Court

---

[4] Edelman v. Jordan, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

when it held that Congress, by enacting the EHA pursuant to §5 of the Fourteenth Amendment, has abrogated the states' Eleventh Amendment immunity to suit. (Pet. App. 71a-72a). The Secretary concedes that Congress has the power to abrogate the states' Eleventh Amendment immunity without the states' consent when it legislates to enforce the substantive provisions of the Fourteenth Amendment; however, there must be unequivocal evidence of such abrogation before it can be assumed to exist. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); Parden, supra. The Court has traditionally required such intent to be either explicit in the statute or plainly evident from legislative history. Quern v. Jordan, 440 U.S. 332, 345 (1979).

In Quern, the Court reaffirmed the holding in Edelman v. Jordan, supra,

that the Civil Rights Act of 1871, 42 U.S.C. §1983, does not abrogate the states' Eleventh Amendment immunity despite the Act's clear intent to vindicate individual rights protected by the Fourteenth Amendment. Certainly the rights Congress sought to protect by the passage of the Civil Rights Act are as constitutionally compelling as the right to equal education which is being advanced by the EHA, yet Congress did not abrogate the states' immunity in 1871 and it is suggested that it has not done so in the EHA.

The Third Circuit's conclusion that, in enacting the EHA, Congress abrogated the states' constitutionally granted immunity, fails to satisfy the stringent criteria recently defined by this Court in Scanlon, supra. There, the Court refused to find such abrogation of immunity in Congressional passage of the

Rehabilitation Act, 29 U.S.C. §974[5] and announced that it will look no further than the four corners of a statute to discern congressional intent to abrogate state sovereign immunity. The Court said:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to

---

[5]The statute at issue in Scanlon is similar to the statute at issue here. Both provide a private right of action for prospective relief for all aggrieved parties and neither explicitly provides a damage remedy or other retroactive relief. Both involve programs through which states receive federal assistance.

> temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute.

473 U.S. at 242 (citations omitted).

Because abrogation of state immunity alters the "constitutionally mandated balance of power between the States and the Federal Government," Scanlon, id. (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985) (Powell, J., dissenting)), the Court emphasized that an unusually high standard of certainty of Congress' intent is required to strip the states of their immunity before it will permit lower courts to upset this

balance. The Scanlon approach "ensures such certainty". 473 U.S. at 243. This unusually strict rule of construction is necessary to guard against expansion of federal court jurisdiction by judicial interpretation and to ensure that lower federal courts will not misinterpret the intent of Congress at the expense of the federal system. Id.

Although Congress has the power to override Eleventh Amendment immunity, it does not necessarily mean that it exercised such power in enacting the EHA. In fact, all indicia are to the contrary; there is no reference, either in the language of the statute itself or in the legislative history, that Congress intended this statute to abrogate rights reserved to the states by the Eleventh Amendment. Undeterred

by the standard of clarity required by this Court in Scanlon, the Third Circuit found Congress's "unmistakenly clear" intent to abrogate the effect of the Eleventh Amendment in the preamble of the EHA:

> ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. §1400(b)(9) (emphasis supplied). (Pet. App. 72a).

The Court of Appeals found additional support for its holding in the following statutory language:

> any party aggrieved by the findings and decision [made in the administrative process] shall have the right to bring a civil action ... in any State court of

> competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. §1415(e)(2). (Pet. App. 73a-74a).

Finally, the Third Circuit relied on the 1986 amendment to §1415(e) which provides for counsel fees in certain circumstances and in which Congress notes that certain provisions in the amendment shall not apply if "the court finds the state or local educational agency unreasonably protracted the final resolution of the action..." 20 U.S.C. §1415(e)(4)(G). (Pet. App. 76a).

On this meager basis, and despite the fact that the statute makes no mention of the Eleventh Amendment and nowhere states that Congress focused precisely on state liability to private

parties, the Third Circuit has discerned the abrogation of a sovereign state's immunity. In so doing, the Court of Appeals has swept aside, without so much as a passing glance, this Court's repeated admonition that the fundamental values of sovereign immunity will not be abrogated unless Congressional intent to do so is unequivocally and unmistakenly clear.

b) In arriving at its holding, the Third Circuit relied on the decision of a divided panel in David D. v. Darmouth School Committee, 775 F.2d 411 (1st Cir. 1985), which held that the EHA effectively abrogates the sovereign immunity of states. (Pet. App. 74a-75a).

In dissenting from his colleagues in the First Circuit, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 20 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent.

David D., 775 F.2d at 425.

Contrary to the position taken by the First and Third Circuits, three other Circuits have not found in the language of the statute that unmistakably clear congressional intent necessary to abrogate the immunity of the states. In Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1983), the Eighth Circuit rejected the contention that the passage of the EHA

abrogates states' immunity. Relying on the clear guidelines announced in Quern v. Jordan, supra, that court held that an intention to sweep away the immunity of states cannot be inferred from the mere fact that the EHA was passed pursuant to the Fourteenth Amendment, but that such an intent must be found in express formal abrogation language or persuasive legislative history.[6] The Miener court then dismissed all causes of action for damage relief against state officials, including relief in the form of compensatory educational services.

---

[6]Miener pre-dates Scanlon and applies the less stringent standard found in Quern v. Jordan, which permitted the court in Miener to look at the legislative history as well as the statutory language.

Similarly, in Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986), the Seventh Circuit held that Congress did not abrogate the Eleventh Amendment immunity of the states by enacting the EHA pursuant to §5 of the Fourteenth Amendment and reversed a reimbursement award which had been made against state officials. 796 F.2d at 945.

Finally, in Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), the Ninth Circuit was faced with an appeal from an order of the district court denying damage claims against the California Superintendent of Education. Although the district court found that state policy violated the student-plaintiff's rights under the EHA, it held that declaratory and injunctive relief were appropriate but that the Eleventh Amendment barred

monetary damage relief against the state. The Court of Appeals specifically held that application of the Scanlon standard to the EHA compelled the conclusion that Congress had not abrogated the states' Eleventh Amendment immunity. 793 F.2d at 1492-94.

In its opinion below, the Third Circuit points to the 1986 amendment to §20 U.S.C. §1415(e) to bolster its conclusion, noting that the decisions of the Seventh, Eighth and Ninth Circuits pre-date that amendment and, consequently, their reasoning and conclusion are no longer tenable. (Pet. App. 76a). The subject matter of that amendment, however, is attorney's fees; the amendment says nothing about state liability to private parties and does not in any way expand the category

of litigants who may sue the states for damages.

The fact that Congress has provided for attorney's fees in actions pursuant to the EHA is perfectly consistent with the states' Eleventh Amendment immunity from suit under that statute.

Attorney's fees are claims for equitable relief, and it is clear that immunity from damages does not ordinarily bar equitable relief. See Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). While this Court specifically has held that the Civil Rights Act does not abrogate the States' Eleventh Amendment immunity, it has also held that 42 U.S.C. §1988 authorizes attorney's fees against state officials as part of the costs in §1983 actions. Hutto v. Finney, 437 U.S. 678, 693 (1978).

Therefore, an amendment to the EHA providing for attorney's fees adds nothing to the Third Circuit's position that the EHA abrogates the immunity of the states to be sued in federal court.

Finally, Congress knows full well how to make clear its intent to remove Eleventh Amendment protection. See Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, §1003(a)(1) (1986). ("A state shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in federal court for a violation of [enumerated statutes].") In fact, the language used in the Rehabilitation Act Amendments is particularly significant since it was employed specifically to overrule the decision in Scanlon.

In enacting the EHA amendment in 1986 Congress certainly was aware of the decisions of the Seventh, Eighth and Ninth Circuits which did not find abrogation of states' immunity; at that point, Congress could have expressed its intent to abrogate the States' immunity to suit, just as it has done in the Rehabilitation Act Amendment. The fact that Congress did not expressly and unmistakably express that intent compels the conclusion that there was no such intent.

Neither the language of the statute nor its 1986 amendment provide one shred of evidence that Congress intended to sweep away the States' immunity when it enacted the EHA. Without such a clear expression of intent, the Third Circuit's opinion must be rejected. At the very least, the conflict among the Circuits calls for this Court's review.

2. THE DECISION OF THE THIRD CIRCUIT, BASED ON AN ERRONEOUS INTERPRETATION OF THE EHA, WOULD GRAVELY DISRUPT EDUCATION FOR THE HANDICAPPED IN PENNSYLVANIA TO THE DISADVANTAGE OF THE HANDICAPPED.

The Third Circuit's decision also held that Pennsylvania's Secretary of Education is precluded from participating in the administrative procedures because the Secretary is not an "impartial" reviewing officer as required by 20 U.S.C. §1415(c). (Pet. App. 48a-49a).

This holding ignores the central role which Congress has assigned to the state's chief educational executive, is detrimental to the proper administration of the EHA, and is not supported by this Court's and other courts' interpretation of "impartial".

a) This Court repeatedly has recognized that, because Congress based the EHA on the landmark decisions in Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) [hereafter PARC], and Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866 (D.C. D.C. 1972), courts should look to those decisions in interpreting the Act. See Honig v. John Doe, 56 U.S.L.W. 4091, 4096 (Jan. 20, 1988); Board of Education v. Rowley, 458 U.S. 176, 192-94, nn. 15-16 (1982). The PARC case in fact established Pennsylvania's impartial due process hearing system as it exists today. The PARC consent decree placed the ultimate responsibility for the handicapped with the Secretary of Education and, thus,

mandated the Secretary's involvement in hearing decisions:

> The hearing officer shall be the Secretary of Education, or a person designated by him acting in his stead, but shall not be an officer, employee or agent of any local district or intermediate unit in which the child resides.

343 F.Supp. at 279 (Amended Stipulation para. 3(1)). Unlike local school units, the Department of Education was considered both impartial and the designated police officer for the interests of the handicapped.

Thus, in striking down Pennsylvania's system for special education hearings, the Court of Appeals struck down as illegal under the EHA the very system on which the EHA was based.

It is clear that Congress's standard of impartiality has been misunderstood by the Court of Appeals. Transferring decision-making authority from the Secretary to hearing officers will not make a decision more impartial. Because a state retains the authority to hire a hearing officer for future decisions, a part-time hearing officer is hardly free from the pressure to conform his decisions with the views of the Department. The court's decision, therefore, does not achieve what it perceives as Congress's goals.

The impartiality Congress sought to achieve was not without consideration for economic constraints or educational perspectives, both of which are legitimate factors in a state's educational decision-making process.

Rowley, 458 U.S. at 207. Instead, Congress's standard of impartiality sought to assure only that the hearing not be conducted by someone closely associated with the very school officials whose educational plan a parent has rejected. Pennsylvania's Secretary of Education, the chief executive officer of a supervising state agency, lacks that close association with those who have formulated a plan rejected by the parents and is, therefore, a permissible reviewer.

b) Moreover, the Third Circuit's decision will damage education for the handicapped and therefore is contrary to congressional intent. This is so for several reasons.

First, the court's interpretation diminishes the authority and, therefore, the responsibility and accountablity

that Congress wished to place on state education departments. The EHA specifically provides that the state educational agency shall be responsible for assuring that the EHA's requirements are carried out. 20 U.S.C. §1412(6). The Act further charges states with the responsibility of "adopting, where appropriate, promising educational practices and materials." Policy guidelines are only a limited tool in implementing these responsibilities. Only by retaining ultimate control over individual decisions can the Secretary effectively implement desirable policies. For this precise reason, the plaintiffs in PARC recommended that: "The ultimate responsibility and authority to assure a free public education appropriate to the educational needs of each school aged mentally retarded child should lie with the

Secretary of Education." Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 93rd Cong., 1st Sess., Part 3, 1513 (1974) (prepared comments of Pennsylvania Association for Retarded Children). Indeed, in Rowley, supra, this mandated limited judicial review out of deference to the state's expertise in making decisions in the individual case. Id. at 207-08.[7]

Second, the decision below, if allowed to stand, will hinder the development of a coherent special education policy. As the Court noted in Rowley, special education decisions are primarily decisions of educational

---

[7]In Rowley, the ultimate education decision to which the Supreme Court deferred had been made by New York's Commissioner of Education.

policy. Transferring final reviewing authority from the Secretary to temporary hearing officers will lead to conflicting decisions. Divorcing the decision of an individual child's program from the state's general policy-making and program development will disrupt the harmony between program development and orders to local schools in individual cases.

c) In arriving at its decision, the Court of Appeals relied on Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), which held that the statutory term "impartial review" precluded the use of Delaware State Board employees from participating as review officers. (Pet. App. 43a). Such reliance on Grymes is clearly misplaced for the simple reason that the Secretary of Education is a high public official

appointed by the Governor in accordance with the provisions of the Constitution of the Commonwealth, 71 P.S. §67.1(d)(1), whose function is to establish and implement statewide educational policy; he is far removed from the individual disputes that arise between parents and local school districts which are directly involved in the education of the child. The nature of the Secretary's function also distinguishes this case from Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291, cert. denied, 455 U.S. 946 (1982) (members of the local educational board may not conduct impartial due process hearings because they are employees of the local educational agency), (Pet. App. 43a) and from dictum in Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983),

(the ban on review by an employee of the agency involved in the education of the child extends to the second level of administrative appeal), (Pet. App. 44a).

In another appellate decision relied upon by the Third Circuit, Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir. 1980), the Eighth Circuit held that the Iowa Superintendent of Public Instruction was an employee of the educational agency involved in the education of the child, albeit indirectly, and hence could not provide the impartial review required by the statute. (Pet. App. 45a). See also Vogel v. School Board of Montrose, 491 F.Supp. 989 (W.D. Missouri) (Deputy Commissioner of Education deemed an employee of an agency involved in the education of the child, consequently not

an impartial reviewer). (Pet. App. 46a-47a).

Reaching a conclusion contrary to that of the Third and Eighth Circuits, the Eleventh Circuit Court of Appeals dismissed as frivolous the argument that the Florida Commissioner of Education could not conduct a review of the due process hearing. Victoria L. by Carol A. v. District School Board, 471 F.2d 369 (11th Cir. 1984). (Pet. App. 48a). Similarly, in Brandon v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740 (E.D. Wis. 1984), the district court held that, since the Superintendent of Public Instruction is a constitutional officer of the State of Wisconsin, he was qualified to sit as an impartial hearing officer. (Pet. App. 47a). While the Third Circuit acknowledged these cases, it did not

find them persuasive, (Pet. App. 48a), adopting the rationale that while the Secretary may not technically be an "employee" of the Department of Education, the Secretary's exercise of both fiscal and regulatory control over the school districts contravenes Congress' intent that the reviewing officer be impartial. (Pet. App. 49a).

The Court of Appeals' conclusion misconstrues the concept of impartial review. It ignores this Court's admonition that administrative adjudicators enjoy "a presumption of honesty and integrity," Withrow v. Larking, 421 U.S. 35, 47 (1975), that is not overcome merely by showing that they occupy one position or another in the governmental hierarchy. Such a presumption can be overcome only by a

risk of "actual bias or prejudgment," ibid, and there is no suggestion in this record of any such thing.

The holding of the Third Circuit interpreting the concept of "impartiality" effectively defeats the very administrative procedure which Congress intended the states to establish and should be reversed.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted and, upon review, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

GREGORY R. NEUHAUSER
Senior Deputy Attorney General

MARIA PARISI VICKERS
CHIEF DEPUTY ATTORNEY GENERAL
CHIEF EASTERN REGION
Counsel of Record

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 86-1605, 86-1610, 86-1629,
87-1130, 87-1134, 87-1159

MUTH, JR., RUSSELL A.,
INDIVIDUALLY AND AS NEXT FRIEND
OF MUTH, ROBERT ALEXANDER

vs.

CENTRAL BUCKS SCHOOL DISTRICT,
DR. NEWMAN, THOMAS L., Superintendent
of the Central Bucks School District
and MARGARET A. SMITH, SECRETARY OF
EDUCATION, COMMONWEALTH OF PENNSYLVANIA

Russell A. Muth, Jr.,
Appellant Nos. 86-1605, 87-1159

Margaret A. Smith, Secretary of
the Pennsylvania Department
of Education,
Appellant Nos. 86-1610, 87-1134

Thomas L. Newman and Central
Bucks School District,
Appellants Nos. 86-1629, 87-1130

On Appeal From The United States
District Court For the Eastern
District of Pennsylvania
(D.C. Civil No. 84-2032)

Submitted Pursuant to Third Circuit
Rule 12(e)
September 2, 1987

BEFORE: WEIS, STAPLETON, and VAN DUSEN,
Circuit Judges

(Opinion filed January 29, 1988)

Russell A. Muth, Jr.
66 Springs Drive
Doylestown, PA 18901

Pro Se

LeRoy S. Zimmerman
Attorney General

Maria Parisi Vickers
Senior Deputy Attorney General

John G. Knorr
Senior Deputy Attorney General

Andrew S. Gordon
Chief Deputy Attorney General
Chief, Litigation Section
Office of Attorney General
206 State Office Building
Philadelphia, PA 19130

Attorneys for Pennsylvania
Secretary of Education

Joanne D. Sommer
Eastburn and Gray
60 East Court Street
Doylestown, PA 18901

Attorney for Central
Bucks School District
and Dr. Thomas L. Newman

Leonard Rieser
Education Law Center
2100 Lewis Tower Building
225 South 15th Street
Philadelphia, PA 19102

Attorney for Amicus Curiae
Pennsylvania Association
for Children and Adults
with Learning Disabilities

OPINION OF THE COURT

STAPLETON, Circuit Judge:

At issue in this appeal are alleged procedural and substantive violations of the Education of the Handicapped Act, 20 U.S.C. §§1401-1415 (1982) (EHA or the Act), as amended by the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-172. The district court held that the procedures devised by the State of Pennsylvania for complying with the conditions on which the EHA provides federal funding for the education of

handicapped children available to states did not meet EHA requirements. The court then held plaintiff entitled to reimbursement for expenditures he made for his handicapped son's tuition at a private school for the 1983-84 academic year. The court did not, however, grant plaintiff an order directing defendants to place plaintiff's son in a private school for the academic year 1986-87 and thereafter. Plaintiff was awarded partial reimbursement of the attorneys' fees he incurred in connection with this lawsuit. As the district court found that the EHA abrogated eleventh amendment state immunity, the State of Pennsylvania was held joint and severally liable for the awards to plaintiff. We will affirm the judgment of the district court on every issue except its determination of the amount

of attorneys' fees to which plaintiff is entitled. On that issue, we will remand for further proceedings.

I.

Plaintiff, Russell A. Muth, Jr., is the parent of Robert Alexander Muth ("Alexander"), a bright child with a language learning disability and associated emotional problems. There is no dispute that Alexander is "handicapped" within the meaning of the EHA, 20 U.S.C. §1401(a)(1) (1976 & 1987 Supp.) and is an "exceptional" child under 22 Pa. Code §§13.1 and 341.1. Accordingly, the EHA requires that Pennsylvania, in return for its receipt of federal funding under the Act, provide Alexander with a free appropriate public education. 20 U.S.C. §1412(1). Alexander's education must be

tailored to his unique needs by means of an individualized educational program (IEP).[1] 20 U.S.C. §§1401(18), 1414(a)(5).

The EHA also requires that Pennsylvania establish procedural safeguards to protect the interest

---

[1]An IEP is a comprehensive plan of the educational program a child is to follow. It is developed by school officials, specialists in the education of handicapped children, and teachers, working with the parents or guardians and, where appropriate, the child. The IEP states, among other things, the objectives of the child's program, the child's educational needs, the services to be provided by the school, and criteria for evaluating the child's progress. IEPs are subject to review and revision at least annually. 20 U.S.C. §1401(19); 34 C.F.R. §§300.346, 300.343(d); 22 Pa. Code §§341.15, 341.17.

of a child such as Alexander in receiving a free appropriate public education. Not only does the parent of such a child have the right to participate in developing the child's IEPs, but the parent may challenge in administrative hearings and in court a proposed IEP which he or she believes provides the child with a lesser education than appropriate. Furthermore, the parent of a handicapped child may challenge conduct or the educational agency which the parent feels has infringed his or her procedural rights. In this case, Muth has claimed both that Alexander was denied an appropriate education and that Pennsylvania's procedures violate rights guaranteed by the EHA and the federal regulations promulgated to supplement the Act, 34 C.F.R. §§300 et seq.

(1987). In addition to pursuing these claims in administrative hearings pursuant to the Pennsylvania procedures that implement the EHA, 22 Pa.Code §§13.31 et seq., Muth has brought this suit against the Central Bucks School District (the "School District") and the Secretary of Education of the Commonwealth of Pennsylvania (the Secretary").[2]

---

[2]Dr. Newman, the Superintendent of the Central Bucks School District, was initially named by Muth as a defendant as well. However, the suit against Newman was dismissed on the ground that Newman was entitled to immunity under the standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982) (official is immune if did not violate statutory or constitutional rights of which a reasonable person would have known). This dismissal is not challenged on appeal.

Alexander first attended Central Bucks schools in 1980.[3] By this time, Alexander's learning disability had already been diagnosed: consequently, when Alexander was enrolled in elementary school for the 1980-81 school year, the School District formulated an IEP for him. Under the IEP, Alexander was placed in a learning disability resource room class, where he received small group and one-on-one instruction and speech and language therapy. He was mainstreamed, or placed in regular classes, for art, music,

---

[3]Prior to this time, Alexander had lived with his mother in Colombia, South America. He had there had three years of schooling, and had spoken Spanish almost exclusively. When he came to live with his father in Pennsylvania. Alexander was 10 years old.

physical education, library, lunch, and recess. Muth approved this initial IEP, as well as revisions made in it in February of 1981. The School District and Muth were also able to agree on an IEP for Alexander for his final year in elementary school, academic year 1981-82, and his first year of junior high school, academic year 1982-83. Improvements in Alexander's scores on various tests indicate that he made considerable educational progress during this time.

At this point, however, Alexander began expressing a desire to be placed in regular classes rather than in classes for learning disabled students. At Muth's request, the School District agreed to mainstream Alexander for English and science, on a trial basis, beginning in March of 1983. During that

month, the School District prepared a proposed IEP for the 1983-84 school year that retained Alexander's placement in the district and included mainstreaming in English and science.

Mainstreaming was not very successful, and on June 17, 1983 an IEP conference was held by the School District to consider various changes in Alexander's program. Muth was in attendance. The main recommendation which emerged from this conference was that Alexander be returned for all substantive subjects to the more restrictive setting of a learning disabled classroom. The School District's proposal was to be embodied in a new IEP to be developed over the summer and implemented in the 1983-84 school year.

Muth, dissatisfied with the School District's planned program for Alexander, requested that a due process hearing be held on the question of whether the School District was providing an appropriate education to Alexander. The School District received this request on June 20, 1983. Muth further requested that no change be made in Alexander's current program until such a hearing had been held.[4]

---

[4]Such a request from a parent is a legal bar against any change in the child's placement under 22 Pa.Code §13.32(22). Pennsylvania law is required to include this provision by 20 U.S.C. §1415(e)(3) and 34 C.F.R. §300.513(a). The School District therefore refrained from revising Alexander's IEP to reflect the June, 1983 recommendations.

Before the fall of 1983, Muth decided to enroll Alexander at the Landmark School, a private school in Massachusetts for learning disabled children. Alexander started at Landmark in September of 1983, and spent the 1983-84 academic year there. Alexander also spent most of the 1984-85 academic year at Landmark, but transferred in April of 1985 to Wyncote Academy,[5] for reasons which are not entirely clear. Alexander returned from Wyncote to the Central Bucks school system at the start of academic year 1986-87.

Muth's due process hearing was held on September 30, 1983 before Hearing

---

[5]Muth has not requested that he be reimbursed for tuition for the time Alexander spent at Wyncote, which has no special education program.

Officer Vernard Trent.[6] At this hearing, the School District presented its March, 1983 IEP. While the School District's June recommendations were placed into evidence, they apparently had never been incorporated into a new IEP. Muth, acting as his own attorney, made various objections to the School District's proposed programs.

Trent handed down his decision on October 31, 1983; he held that the

---

[6]Normally, Pennsylvania law requires the initial due process hearing to be held within 30 days of receipt by the Pennsylvania Department of Education of the parent's request, 22 Pa.Code 13.32(10). Under the same provision, however, a parent may request and receive extensions of these time limits. In this case, the extra delay was largely, if not entirely, due to Muth's own requests for postponement of the hearing. See App. at 285.

School District's current 1983-84 IEP, which still included the mainstreaming for English and science, was inappropriate. Trent also made a set of recommendations: that the School District should consider whether Alexander should be in a more restrictive placement; that the School District chould address Alexander's auditory disability; and that the School District, considering Alexander's giftedness, should provide Alexander with additional special activities and services. Trent did not order that Alexander be placed in a private school offering a program similar to Landmark's, as Muth had requested, nor did he find that the School District was unable to provide Alexander with an appropriate education.

Both Muth and the School District appealed from Trent's decision. Pursuant to 22 Pa.Code §13.32(24), the appeal was submitted to the Secretary. On January 23, 1984, the Secretary decided to remand the case to Hearing Officer Trent, with instructions to the School District to revise the IEP for Alexander to include, inter alia, the June, 1983 recommendations and to then present the revised IEP to Trent. The School District, working with Muth, proceeded to revise the IEP.

On June 7, 1984, the School District presented to Trent its revised IEP, dated May 1, 1984, and Muth presented his objections to it. On July 25, 1984, Trent issued his decision that this modified IEP was an appropriate program of special education for Alexander, and that the School District was capable of implementing it. Muth again appealed to

the Secretary, and on October 24, 1984, the Secretary affirmed Trent's decision.

During the course of the above proceedings, on April 28, 1984, Muth filed suit in federal district court.[7] He claimed that the School District's IEP for Alexander was inappropriate under the EHA, and sought tuition reimbursement for 1983-84 and an order that the School District pay for Alexander to attend Landmark in future.[8] Muth was allowed to amend

---

[7]Defendants' argument that Muth's suit in federal district court was improper as Muth failed to exhaust his administrative remedies did not prevail in district court and is not before us on appeal.

[8]Muth also alleged violations of §504 of the Rehabilitation Act, 29 U.S.C. §794 and of the equal protection and due process clauses of the 14th amendment via 42 U.S.C. §1983, but later amended his complaint to drop those claims.

his complaint to add a claim that Pennsylvania's due process procedures did not conform to the requirements of the EHA, 20 U.S.C. §1415, and on June 2, 1986, the trial court granted summary judgment to Muth on this procedural claim. Muth v. Smith, 646 F.Supp. 280 (E.D. Pa. 1986). The court also requested the School District to prepare an IEP for Alexander for the 1986-87 school year. In response, an IEP was prepared and submitted for the 1986-87 school year that was very similar to the IEP for 1983-84.

A trial was held in August of 1986 on the issues of the effect of the procedural flaws of the Pennsylvania statute and the appropriateness of the 1983-84 and 1986-87 programs offered to Alexander by the School District. The district court held that the School

District's IEPs for both years were appropriate, but that the procedural defects of Pennsylvania's administrative procedures "rendered the IEP inappropriate for 1983-84". Memorandum and Order of August 28, 1986, App. at 846. Accordingly, the court ordered judgment in Muth's favor for the 1983-84 tuition reimbursement. The court also awarded Muth the attorneys' fees incurred in pressing his arguments on the procedural violations and on the substantive sufficiency of the 1983-84 IEP. The judgment was entered against both the School District and the Secretary.

Muth appeals from the district court's judgment that the proposed 1986-87 IEP would provide Alexander with a free appropriate public education, and

again seeks an order directing that the defendants place Alexander in a private school with programs similar to Landmark's. Muth also challenges the district court's determination that the 1983-84 IEP was appropriate. The School District and the Secretary have filed cross-appeals challenging the district court's determination that Pennsylvania's administrative procedures violated federal law, that tuition reimbursement was an appropriate remedy, that the EHA abrogates Pennsylvania's immunity, and that the attorneys' fees award was proper.

II.

We first address Muth's contention that the 1983-84 and 1986-87 IEPs

proposed by the School District should have been found inappropriate. Under 20 U.S.C. §1415(e)(2), a district court is to determine whether a challenged IEP is appropriate based on a preponderance of the evidence. On review, we may overturn this factual decision only if we find clear error. Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3rd Cir. 1986), cert denied 107 S.Ct. 99 (1986). In this case, we conclude that the district court did not err in finding the IEPs appropriate.

As the Supreme Court commented in its first case involving interpretation of the EHA, Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 189 (1982), "[n]oticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded

handicapped children."[9] In Rowley, the Court interpreted the EHA as requiring "no more than a basic floor of opportunity," id. at 201, consisting of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." Id. at 203. The EHA

---

[9]The Act does expressly define the phrase "free appropriate public education." Section 1401(18) provides that:

> The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized educational program required under section 1414(a)(5) of this title.

does not require a program that maximizes a handicapped child's potential, id. at 197 n. 21, 199, but rather one which is "reasonably calculated to enable the child to receive passing marks and advance from grade to grade." Id. at 204. See also Board of Educ. of E. Windsor Regional School Dist. v. Diamond, 808 F.2d 987, 991 (3d Cir. 1986) (EHA "requires a plan likely to produce progress, not regression or trivial educational advancement"). The Court posed two questions to be answered by district courts in cases such as the one before us now:

> First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational

> program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can required no more.

458 U.S. at 206-07. Muth's factual challenge is to the district court's affirmative answer to the second Rowley question.

There is ample evidence in the record to support the district court's carefully-reached conclusion that the 1983-84 and 1986-87 IEPs developed by the School District constituted a free appropriate public education for Alexander under the EHA as interpreted

by Rowley.[10] Among the factors considered by the district court were

---

[10]Muth complains that he had no chance to participate in the development of the 1986-87 IEP. It is true that the 1986-87 IEP considered by the district court was prepared unilaterally by the School District at the court's request. However, this IEP was based on the 1983-84 IEP, which Muth participated in developing; on the June, 1983 recommendations, which Muth was also involved in developing; and on the recommendations of Hearing Officer Trent, who heard Muth's evidence and arguments. The reasons for the district court's request that the School District go ahead and draft a proposed IEP for the 1986-87 school year was so that the District would not have to start from scratch in developing an IEP for Alexander at the beginning of that year. In this way, the School District would be able to meet with Muth before or at the beginning of that academic year, and develop a final program with the requisite parental input. Muth does not claim that he was excluded from involvement in developing Alexander's IEP after August 28, 1986, when the decision of the district court holding the 1986-87 IEP appropriate was handed down. Accordingly, we find Muth has no ground for complaint on this score.

the School District's plan and its ability to make available to Alexander computer facilities, a variety of elective courses, one-on-one and small group instruction, mainstreaming for some classes,[11] and regular psychological counseling. Additionally, the district court considered the opportunity for Alexander, if he remained in the School District's

---

[11] As the district court noted, there is a statutory preference for choosing the least restrictive placement appropriate for a handicapped child. 20 U.S.C. §1412(5)(B); see Kruelle v. New Castle County Sch. Dist., 642 F.2d 687, 695-96 (3d Cir. 1981) (recognizing preference but also recognizing that a residential program may be the only appropriate program for some severely disabled children). The School District's program, which includes some mainstreaming, would be less restrictive than the residential programs requested by Muth.

programs, to develop his relationship with his father and with his peers in the community. The district court heard evidence from a number of experts and educators, and compared the School District's programs with those offered by Landmark,[12] before concluding that the School District's proposed programs

---

[12]Muth claims in particular that the trial judge clearly erred in finding that the multisensory approach of the School District, which emphasized visual instruction (Alexander's strength), was the same as the multisensory approach used by Landmark, which emphasized oral or phonetic instruction (Alexander's weakness). It appears that the two approaches, while very similar, do differ. However, the record supports the conclusion that the approach used by the School District was an appropriate one, which is all that is required by law. Therefore, even if the trial judge be understood as concluding that the School District's chosen method of instruction was identical to Landmark's, the error was harmless.

were appropriate.[13] We find no clear error in this conclusion, and therefore will not set it aside.

III.

The next issue presented for our review is whether the district court was correct in holding that the Pennsylvania statutory scheme for providing parents of handicapped children with due process violates federal standards. As this is

---

[13] In this appeal, Muth raises for the first time the claim that Pennsylvania law goes beyond the federal minimum to set a higher substantive standard for the quality of the program which must be available to handicapped children. Appellant's Brief at 15. Because Muth did not make this argument before the district court, we decline to express an opinion on it.

a question of statutory construction, our review is plenary. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981).

The EHA allows states to choose to establish either a one-tier or two-tier due process hearing system for review of the appropriateness of a challenged IEP. In a one-tier system, an impartial hearing is conducted under the auspices of the state educational agency, and the losing party may appeal to the courts. In a two-tier system, an impartial hearing is conducted under the auspices of the local educational agency, and appeal may be taken to the state level and then to the courts. Because the exact language of the federal statute and regulations is important in determining whether Pennsylvania law is in compliance with federal requirements,

we set out the relevant parts of the EHA and the Code of Federal Regulations here despite their length. Under 20 U.S.C. §1415(b)(2):

> Whenever a complaint has been received under paragraph (1) of this subsection (requiring an opportunity for the parent to present complaints with respect to any matter relating to the child's education), the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Section 300.507 of the regulations amplifies this:

> (a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

Section 1415(c) provides that:

> If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency... any party aggrieved by the findings and decision rendered in such a hearing

may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Section 300.510 adds to this that:

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

...

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights

in §300.508 (to be represented by counsel, to present evidence, to cross-examine witnesses, and so forth) apply;

...

(c) The decision made by the reviewing official is final, unless a party brings a civil action under §300.511.

Under §1415(e)(1):

> A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) (allowing appeal to courts by any party who has no right to appeal under §1415(c)) of this subsection. A decision made under

subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

And under §300.511:

> Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under §300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under §300.510 has the right to bring a civil action under (§1415(e)(2)).

Finally, 34 C.F.R. §300.512 adds a stringent time limitation on these proceedings:

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) or (b) of this section at the request of either party. Thus, the federal scheme contemplates that a child and his or her parent who are dissatisfied with a proposed IEP will normally receive a final, impartial, judicially reviewable, administrative

decision within two and one-half months.

Under the system chosen by Pennsylvania to implement these federal requirements, whenever a school entity purposes (sic) to alter the educational status of a handicapped child, it must notify the parents of their "right to a placement conference with the school entity involved and of the right to a full hearing before the Secretary or the designee of the Secretary on the proposed action." 22 Pa.Code §13.32(2). If the conference does not resolve any dispute, the parent may request a due process hearing. §13.32(9). The request must be forwarded by the school district within 10 days to the Department of Education of the Commonwealth, a state agency headed by the Secretary. §1332(10). The Secretary, or his designee, then

assigns a hearing officer so that a hearing may be held no less than 15 days, and no more than 30 days, after the receipt of the request by the Department. §13.32(10), (12). The individual assigned by the Secretary or his designee may not be "an officer, employee, or agent of any school district or intermediate unit in which the person resides." §13.32(12). The hearing must be held in the school district involved. §13.32(11).

After the due process hearing, the hearing officer must render findings of fact and conclusions of law in no more than 20 days. §13.32(21). "The decision of a hearing officer may be appealed to the Secretary." §13.32(24). The district court also found as a fact that the statement of written procedures provided to parents refers to the hearing officer's report

as "Findings of Fact... and a list of recommended orders (recommendations) which the hearing officer believes the Secretary of Education should adopt." 646 F.Supp. at 283.

The district court held that Pennsylvania has elected to have the initial hearing and the review conducted at the state level and that this is a violation of federal law. The court also held that even if the initial Pennsylvania hearing were a local one, Muth would be entitled to summary judgment on his procedural claims because the Secretary's remand to Trent violated the finality requirement of federal law, and because the Secretary must be considered an employee of Pennsylvania's state educational agency and an improper reviewing officer. We address those issues in reverse order.

1. The involvement of the Secretary.

The EHA speaks of the due process hearing being "conducted by the State educational agency or by the local educational agency ... as determined by state law." §1415(b)(2). It also describes the "impartial review of such hearing" as being "conduct(ed)" by the state educational agency. §1415(c). However, the text of the statute, the regulations, and the legislative history establish that due process hearings and impartial reviews are, in actuality, to be conducted by individuals called "hearing officers" or merely "officers", e.g. §1415(c); §300.507, appointed by the agency under whose auspices the due process hearing or impartial review is held, and that it is these officers who are to be the decisionmakers. Section 1415(b)(2) provides that a due

process hearing, whether "conducted" by a local agency or a state agency, shall be presided over by an individual who shall not be an "employee of such agency." Section 1415(e)(1) provides that any "decision made in (such) a hearing shall be final" unless additional administrative or judicial review is permitted and sought.

Section 1415(c) speaks about review of the decision reached at the due process hearing where a state elects a two-tier system. It specifies that the review shall be conducted by an "officer" who is "impartial" and will make "an independent decision." Section 300.510 of the regulations, promulgated under the authority of §1415(c), allows the reviewing officer to hold a hearing and receive additional evidence, but provides that if a hearing is held it must conform to the requirements for

an initial due process hearing. Section 300.510 also requires that the decision of the reviewer be "final."

The regulations provide that "each public agency shall keep a list of persons who serve as hearing officers," §300.507(c), suggesting that each agency, local or state, is to do the appointing of the decisionmaker at its particular level.

The Conference Committee on the EHA made the thinking behind these provisions unmistakably clear in its Joint Explanatory Report:

> any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial officer since the State or local agency or intermediate unit will be a party to any complaint presented.... [N]o hearing may be conducted by an employee of the State or local educational agency involved in

> the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing.

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1502.

As the Secretary stresses, although the EHA expressly forbids employees of an educational agency from serving as hearing officers for due process hearings, §1415(b)(2), it does not contain a similar express prohibition with respect to officers assigned to conduct "impartial reviews." As we have noted, however, it does stipulate that such reviewing officers must be "impartial" and reach an independent decision. Given this fact, the ultimate objectives of the process, the

similarity of the responsibilities of due process hearing officers and impartial reviewing officers, and the above-quoted legislative history, we and most other courts addressing the issue have concluded that employees of a state educational agency may not be appointed to conduct an impartial review.

In Grymes v. Madden, 672 F.2d 321, 323 (3d Cir. 1982), this court held that service as state-level review officers by employees of the Delaware State Department of Public Instruction constituted a denial of impartial review. In Helms v. McDaniel, 657 F.2d 800, 806 n. 9 (5th Cir. 1981), reh'g denied 664 F.2d 291, cert. denied 455 U.S. 946 (1982), the Court of Appeals for the Fifth Circuit found that employees of the state educational agency could not conduct a review because "[a]s the legislative history

indicates, the impartiality demanded in the review proceeding cannot be achieved when the educational agency or one of its employees is in charge of the proceeding." Similarly, in Colin K. by John K. v. Schmidt, 715 F.2d 1, 5 n. 3 (1st Cir. 1983), the Court of Appeals for the First Circuit said that the "legislative history indicates that the prohibition against review by an employee of the agency involved extends to the second level of administrative appeal as well."

Having concluded that employees of the state educational agency may not conduct a review proceeding under §1415(c), we must next determine whether the Secretary of Education of the State of Pennsylvania is an employee of the state educational agency for purposes of the EHA.

In the Grymes case, the review officer was an employee of the Delaware Department of Public Instruction, see Grymes v. Madden, No. 79-55, Slip. Op. at 4 (D. Del. 1979), aff'd, 672 F.2d 321 (3d Cir. 1982), and not a state official of cabinet rank like the Secretary. The Secretary attempts to distinguish Grymes on this basis, relying upon caselaw in which the impartiality of a high state official was presumed in other contexts. E.g., Withrow v. Larking, 421 U.S. 35, 47 (1975). Several courts have taken a contrary view, holding that officials in positions similar to the Secretary's are to be considered employees of the state agency and unable to conduct the impartial reviews required by the EHA. In Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir. 1980), for example, the Iowa Superintendent of Public Instruction was

held to be an employee of the State Board of Public Instruction, Iowa's state educational agency, and thus unable to serve as hearing officer for the single state-level administrative proceeding provided by that state. The Superintendent had there contended that because he was not employed by the local agency, he was not employed by an agency involved in the education of the handicapped child; the court, however, took the view that the state agency was also involved in the education of the child, albeit indirectly. In Helms, supra, the court considered it "clear that the State Board (of Education) could not itself conduct the review." 657 F.2d 806 n. 9. And in Vogel v. School Bd. of Montrose, 491 F.Supp. 989, 995 (W.D. Mo. 1980), the Deputy Commissioner of Education was held to be an employee of the Missouri State

Board of Education and as such not allowed to serve as a state-level review officer. The Vogel court concluded that:

> Defendants' argument that the State Board of Education is not an 'agency or unit involved in the education or care of the child' pursuant to §1415(b)(2) because under the Missouri Constitution... the State Board is charged with "supervision of instruction", is untenable. Acceptance of the State defendants' interpretation would abrogate the intent of the statutory language in §1415(b)(2) and §1415(c), which is to ensure impartial review.

491 F.Supp. at 995.

There are two decisions that resolve the issue the other way. In Brandon E. v. Wisconsin Dep't of Public Instruction, 595 F.Supp. 740, 746 (E.D. Wisc. 1984), the Superintendent of Public Instruction, a constitutional officer of the state, was held not to be considered a school employee under the

EHA and not in any way precluded from conducting a review of the initial due process hearing. Similarly, in Victoria L. by Carol A. v. District School Bd., 741 F.2d 369, 374 (11th Cir. 1984), the argument that the Florida Commissioner of Education could not review the decision of the initial local hearing officer was held to be frivolous.[14] We respectfully disagree with these decisions.

In the EHA, Congress has indicated its desire to provide parents with decisionmakers who are not subject to the kind of pressures that employees of an educational agency would necessarily

---

[14]The Tenth Circuit, in Cain v. Yukon Public Schools, 775 F.2d 15, 20 (10th Cir. 1985), noted the conflict between Grymes and Helms on the one hand and Victoria L. on the other, but did not address the issue as it had only been raised on appeal.

feel. The district court in this case, reasoning that the Secretary "directly exercises both fiscal and regulatory control over the school district and ... is at least involved in the education of handicapped children as were the employees of the Delaware Department of Public Instruction in Grymes," 646 F.Supp. at 283, held that the Secretary of Education must be considered the equivalent of an employee of Pennsylvania's state educational agency for purposes of the EHA. We agree with this reasoning and conclusion.

2. Finality

Muth did not receive a final decision until October 24, 1984, over a year after the School District received his request for a due process hearing (June 20, 1983) and the initial hearing

was held (September 30, 1983). The main reason for this delay was the Secretary's use of the remand procedure; rather than affirming or rejecting Trent's first decision in an appealable final order, the Secretary sent it back for another half year of proceedings. Additional time then slipped away during Muth's second appeal to the Secretary. Yet the Secretary argues that the remand procedure, since it is not specifically prohibited by federal law, is permissible.

While in many contexts the power to remand is inherent in the concept of appellate review, in the context of the EHA a remand following an "impartial review" is fundamentally inconsistent with the statutory scheme. As we have earlier noted, the EHA and its implementing regulations reflect the

importance not only of procedural protections but also of prompt resolution of disputes over the proper education of a handicapped child. Section 300.512 of the regulations, for example, imposes a stringent timetable that, absent reasonable requests for continuances, guarantees an administratively final and judicially reviewable decision no later than 75 days from the date of receipt of the request for a due process hearing. With respect to the "impartial review" proceedings, §300.512(b) specifically requires the state agency to "insure... [that] a <u>final</u> decision is reached in the review" within 30 days of receipt of the request for a review. (Emphasis supplied). The Secretary clearly violated this regulation by sending the case back to the due process hearing officer for further proceedings rather

than entering an appealable final decision. If the Act contemplated such action in this context, we are confident that §300.512 would have provided some time limitation on remand proceedings. In the absence of such a limitation we are unwilling to eviscerate the protection §300.512 does afford by sanctioning the Secretary's action.

3. Pennsylvania's scheme for hearing and review

The Secretary argues that the initial hearing is actually a local one because it is "conducted" by the school district, which is the entity that receives a parent's request for a hearing, schedules the hearing, and notifies the parent. Thus, in the Secretary's view, Pennsylvania has opted for a permissible two-tier system consisting of a due process hearing at

the local district level and "impartial review" at the state level. Alternatively, the Secretary argues that the federal law does not preclude a state-level hearing and a state-level review, maintaining that the provision for a single state-level decision procedure indicates that the drafters of the EHA felt that further review was not necessary when the initial hearing was conducted at the state level. As to achieving the speed and finality that are the objectives of the EHA, the Secretary argues, it matters little whether there is a local hearing and state-level review or whether there is a state hearing and state-level review. Thus, even if there is a conflict between Pennsylvania's statute and the federal law, the Secretary contends that it is only one of form, not substance,

and should be ignored on the ground that states are meant to have flexibility in creating procedures under the EHA.

Muth, supported by amicus curiae Pennsylvania Association for Children and Adults with Learning Disabilities, contends that the initial hearing is conducted by the state because the initial hearing officer, selected by the Secretary, is a state representative; a state-level review of a state-level hearing is impermissible, they argue, because the federal scheme envisions either one decision or two independent decisions at separate levels.

The district court understandably concluded that the decisionmaker was at the heart of the process and that the entity that "hired the hall" and made the other arrangements for the due process hearing was not as important.

It read the Pennsylvania Code provisions calling for the Secretary to assign the hearing officer and recognizing a right of parents to "a full hearing before the Secretary or the designee of the Secretary" as indicating that Pennsylvania's due process hearing occurs at the state level. In the district court's view, a system involving two decisions at the state level was in irreconcilable conflict with federal law.

If, as the district court suggests at one point based on the written procedures distributed to parents, Pennsyvlania treats the due process hearing examiner as a special master who makes recommendations to be accepted or rejected by the Secretary, its procedure clearly violates the federal requirements for a one-tier system since the hearing officer is not the final

administrative decisionmaker. Helms, supra, 657 F.2d 800, 805 (holding Georgia's provision that state reviewing officer's decision could be accepted or rejected by Georgia Board of Education violative of federal finality requirement). If, as the district court apparently concluded, the Pennsylvania system is more accurately described as a two-tier system consisting of a state-level due process hearing following by a state-level impartial review, there would appear to be a formal inconsistency with the federally required scheme even if the Secretary were not involved as a decisionmaker. Nevertheless, we would hesitate to invalidate the result of the Pennsylvania process solely on that ground since states are permitted under the federal scheme to create a process

taking up the time necessary for two tiers of proceedings and since review and decision by truly impartial individuals, by whomever designated, would result in independent decisions and thus would appear to constitute substantial compliance with the federal scheme.

We find it unnecessary, however, either to characterize the Pennsylvania system as a one- or two-tier system or to rule on whether a two-tier system conducted in its entirety on the state level is permissible. Given our holding that the Pennsylvania process afforded in this case violated federal law because of the Secretary's participation and the remand, we must affirm the district court's ultimate conclusion on the issue of compliance with the federal scheme. If our holding is not disturbed

by the Supreme Court, this will presumably mean that the Pennsylvania procedures will have to be revised in order for Pennsylvania to remain eligible for EHA funding. However, since there is no reason to believe that Pennsylvania will opt to set up a two-tier system in which both the due process hearing and the impartial review are conducted by state-designated officers, the validity of such a system, for present purposes, is purely hypothetical. Accordingly, we express no opinion on it.

IV.

The next issue is whether reimbursement for Alexander's 1983-84 tuition at Landmark was properly

ordered. In considering this issue we first note that a district court is authorized by 20 U.S.C. §1415(e)(2) to "grant such relief as the court determines is appropriate." The Supreme Court held in School Comm. of the Town of Burlington v. Dep't of Educ. of Massachusetts, 471 U.S. 359 (1985), that by empowering the court to grant "appropriate" relief Congress meant to include retroactive reimbursement to parents as an available remedy. In the course of reaching that conclusion, the Court observed:

> The statute directs the court to "grant such relief as [it] determines is appropriate." the ordinary meaning of those words confers broad discretion on the court. The type of relief is not further specified.... Absent other reference, the only possible interpretation is that the

> relief is to be "appropriate" in light of the purpose of the Act.

471 U.S. at 369. The Court concluded its opinion in Burlington with the comment that the statute's reference to "appropriate" relief meant that equitable considerations were relevant in fashioning relief under the EHA. Id. at 374.

Since Burlington, several courts of appeal have held that "appropriate" relief is determined by the equities of the case. See Jenkins v. Florida, 815 F.2d 629, 631 (11th Cir. 1987) ("Whether reimbursement is appropriate, and at what amount, should be determined by balancing the equities of the particular case"); Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 (5th Cir. 1986) (stating

various factors to be taken into account by district court in determining whether parent entitled to full or partial reimbursement for tuition expenses); see also McKenzie v. Smith, 771 F.2d 1527, 1535-36 (D.C. Cir. 1985) (listing factors weighed by district court in determining appropriate relief, and upholding that relief as properly granted).

The defendants acknowledge that a local school district, unsheltered by the 11th amendment, may be required to reimburse parents for the out-of-pocket expenses of alternative placement in cases where it is ultimately held that the IEP proposed by the school did not provide a free appropriate public education. They maintain, however, that reimbursement of such expenses is not authorized where the IEP is upheld and

the parents prevail only on a claim that they were denied the process required by the EHA. They assert that since the IEP in this case was ultimately sustained, the alternative placement of Alexander was not justified and the monetary award to Muth, in reality, was not reimbursement but a form of compensatory damages. In support of this contention defendants rely upon the following language from Burlington:

> [T]he Town repeatedly characterized reimbursement as "damages," but that simply is not the case. Reimbursement merely requires the Town to belatedly pay expenses that it should have paid all along and would have borne in the fist instance had it developed a proper IEP.

471 U.S. at 370-71.

While there is case law suggesting that compensatory damages based solely on violations of a parent's procedural rights may be available under the EHA,[15] we find it unnecessary to

---

[15] In Hall v. Vance County Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), for example, a reimbursement award was upheld where the school district had violated the EHA's notice provisions and had failed to develop an appropriate IEP; in the course of reaching its holding, the court said that "under Rowley, these failures to meet the [EHA's] procedural requirements are adequate grounds by themselves for holding that the school failed to provide" the child with a free appropriate public education. 774 F.2d at 635. The Fifth Circuit in Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986), concurred, saying:

> We agree with the Fourth Circuit in finding that failures to meet the Act's procedural requirements are 'adequate grounds by themselves'for holding that the school failed to provide a free appropriate public education, as mandated by the Act.

resolve that issue here. This is not a case in which a parent was reimbursed

---

[15] (Continued)

806 F.2d at 629 (quoting Hall). However, the school in Jackson had also failed to provide a substantively appropriate IEP. The Jackson court remanded for a determination of the appropriate award, which it said could either be monetary (though no private school tuition had been paid by the parent) or take the form of remedial educational services. It has not yet been held, however, that procedural violations in and of themselves will justify an award of tuition reimbursement where a parent unilaterally decides to place his child in private school during the pendency of the due process proceedings and where the IEP offered by the public school for the period at issue is ultimately determined to be appropriate. See Scituate School Comm. v. Robert B., 620 F.Supp. 1224, 1231-32 n. 2 (D.R.I. 1985), aff'd without opinion 795 F.2d 77 (1st Cir. 1986) ("While grave procedural errors ... may be sufficient to invalidate an IEP on its face, no court has yet had to address the issue").

for the out-of-pocket expense of alternative placement after rejecting an IEP that would have provided his child with a free appropriate public education during the period for which reimbursement was ordered. In this case, the IEP to which Muth initially objected was found by the due process hearing officer to be inadequate; the process, taking a course not contemplated by the federal model, bogged down for a substantial period of time; and the IFP ultimately found to be acceptable did not even come into existence until May of 1984. While we are mindful of the fact that Muth contributed to the delays in the case, we cannot say that the district court abused its discretion in concluding that alternative placement of Alexander was

reasonable[16] and that reimbursement of Muth for the out-of-pocket expense of this alternative placement for the

---

[16]The district court explained this decision, in part, as follows:

> Under these circumstances, I conclude that the appropriate remedy is reimbursement for one full year of tuition at the Landmark School. If the process had not been delayed by the flaws in the state process, a final decision would have been rendered by the Secretary of Education no later than December 1983 rather than October 1984. Mr. Muth would then have known that his challenge had failed at least at the state level, and he could have reevaluated his decision to place Alexander at Landmark at his own expense.

Memorandum and Order of August 28, 1986, App. at 835.

school year 1983-84 was required by equitable considerations.[17]

---

[17]The School District claims that the reimbursement award is improper against it because the due process scheme of the state, and not the conduct of the School District, violated Muth's rights. In support of this contention, the School District cites Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied 474 U.S. 817 (1985) (holding no attorneys fee award should be made against school district where plaintiff prevailed because state administrative process conflicted with federal law). In this case, however, the School District is in part responsible for the absence of an appropriate IEP for Alexander during the course of the 1983-84 school year, and thus must remain jointly and severally liable with the Secretary.

IV.

We next address the question, raised on appeal by the Secretary, of whether the 11th amendment to the Constitution bars reimbursement by the state of plaintiff's expenses.[18] This is also an issue of statutory construction requiring plenary review.

The 11th amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

---

[18] As the 11th amendment claim is "in the nature a of jurisdictional bar", it may be raised and considered on appeal. Edelman v. Jordan, 415 U.S. 651, 678 (1974): see also Gomez v. Illinois State Bd. of Educ., 811 F.2d 1030, 1036 (7th Cir. 1987).

U.S. Const. amend. XI. As the Secretary correctly points out, the 11th amendment has been consistently interpreted by the Supreme Court to preclude federal court suits against a state by the state's own citizens, see, e.g., Welch v. State Dep't of Highways and Public Transportation, ____ U.S. _____, 107 S.Ct. 2941 (1987); Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984); Parden v. Terminal Ry. of Alabama State Docks Dep't, 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890), and to preclude suits for equitable relief as well as damages, Edelman v. Jordan, 415 U.S. 651, 667 (1974). For 11th amendment purposes, a suit against a state official in his or her official capacity, as here, is the

equivalent of a suit against the state, since the state is the real party in interest. Edelman, supra, 415 U.S. at 666-67. Accordingly, we are confronted with the issue of whether the 11th amendment bars suits against a state in a federal court under the EHA.

Section 5 of the 14th amendment authorizes Congress to enforce the provisions of that amendment by "appropriate legislation." Utilizing this authority, Congress may abrogate the immunity from federal court suits bestowed on the states by the 11th amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). However, if Congress chooses to override 11th amendment rights, it must make its intentions clear. The Supreme Court has admonished that federal courts must "be certain of Congress' intent before finding that federal law overrides the

guarantees of the Eleventh Amendment." Scanlon, supra, 473 U.S. at 243. So that immunity will prevail in the absence of a conscious congressional decision that it must be sacrified (sic) to preserve 14th amendment values, the Supreme Court has declared that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Id. While the text of the federal legislation must bear evidence of such an intention, the legislative history may still be used as a resource in determining whether Congress's intention to lift the bar has been made sufficiently manifest. United States v. Union Gas Co., 832 F.2d 1343, 1349-50 (3d Cir. 1987).

The text of EHA and its legislative history leave no doubt that Congress

intended to abrogate the 11th amendment immunity of the states. In the preamble of the Act, Congress declared it necessary to exercise its rights under §5 of the 14th amendment in order to assure equal protection of the law for handicapped children. Thus in §1400(b)(9), Congress expressly "finds that ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."

The EHA then goes on to establish a national minimum standard for the education of handicapped children and to set up a detailed process for identifying handicapped children and ascertaining what the federal standard requires in each individual case. The

state educational agency is responsible under the EHA to see that this process is successfully implemented. Moreover, if for any reason a local educational agency is unwilling or unable to provide a handicapped child with a "free appropriate public education," the state agency is required to step in and provide that education by contract or otherwise. §§1411(c)(4), 1413(b), 1414(d); 34 C.F.R. §300.360. Most importantly, the EHA not only confers substantive and procedural rights upon handicapped children and their parents vis-a-vis the state educational agency, it bestows upon them the right to seek judicial enforcement of those rights in a federal or state court. Section 1415(e)(2) provides that

> any party aggrieved by the findings and decision (made in the administrative process)

> shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Because the EHA and its legislative history reflect the "most basic of political knowledge that free public education is provided by and under the aegis of the states," the Court of Appeals for the First Circuit concluded in David D. v. Dartmouth School Comm., 775 F.2d 411, 422, (1st Cir. 1985), that Congress clearly contemplated litigation under the Act against a state in the federal courts. We find its reasoning compelling:

> Under the federal Act and its implementing regulations, the State educational agency promises to ensure that it and its local educational agencies will provide at minimum a free appropriate public education. Part of

these guaranteed rights is the due process complaint and hearing system which is to take cognizance of "any matter relating to" a disabled child's education or procedural rights. The culmination of the state administrative appeals process is the right of any party "aggrieved" by the decision or procedure employed to take the matter to either state or federal court. §1415(e)(2). Obviously, since the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceeding. The legislative history reinforces this view. See supra at 13 (primary author of bill stated: "In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local educational agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child...").

Id.

After the decision in David D., Congress amended §1415(e) to provide for counsel fee awards under specified circumstances. In that 1986 amendment, Congress expressly noted its understanding that suits in the federal or state courts under §1415(e) necessarily involve "the State or local educational agency" as a party. 20 U.S.C. §1415(e)(4)(G).

Although a number of other courts of appeal have held that the EHA does not abrogate 11th amendment immunity, none have articulated a rationale as persuasive as that of the First Circuit and none have reached this result after the 1986 Amendment to the EHA. See Gary A. v. New Trier High School Dist., 796 F.2d 940, 943-44 (7th Cir. 1986); Miener v. Missouri, 673 F.2d 969, 980-82 (8th Cir. 1982), cert. denied 459 U.S. 909

(1983); Rose v. Nebraska, 748 F.2d 1258, 1262 (8th Cir. 1984), cert. denied sub nom. Lutjeharms v. Rose, 474 U.S. 817 (1985); Doe by Gonzales v. Maher, 793 F.2d 1470, 1493-94 (9th Cir. 1986), later proceeding 795 F.2d 1470, 1493-94 (9th Cir. 1986), later proceeding 795 F2d (sic) 787, cert. granted in part sub nom. Honig v. Doe, 55 U.S.L.W. 3569 (1987) (not on 11th amendment issue).

We now join the Court of Appeals for the First Circuit in holding that the EHA authorizes suits against states in a federal court. Since the "jurisdictional bar (of the 11th Amendment) applies regardless of the nature of the relief sought," Pennhurst, supra, 465 U.S. at 100, and there is thus no distinction to be made between actions for injunctive relief and for damages in the context of an EHA suit

against a state agency, we hold that Congress, in authorizing such suits, must have contemplated that tuition reimbursement judgments like the one here entered against Pennsylvania would be a party of §1415(e) litigation.

V.

The final question before us concerns the aware of attorneys' fees to Muth, which we review for abuse of discretion. Lindy Bros. Builders, Inc. v. American Radiator & Sanitary Corp., 487 F.2d 161, 166 (3d Cir. 1973). The award originally made included only fees incurred in connection with the due process issue, on which plaintiff prevailed by summary judgment. This award was modified shortly thereafter to include fees incurred in litigating the

merits of the issue of the appropriateness of the 1983-84 IEP. In its final decision on the issue, the district court recognized that the procedural challenge on which Muth prevailed was entirely distinct, factually and legally, from Muth's substantive claims on the merits of the 1983-84 IEP and the 1986-87 proposed IEP. Because the court had deferred its decision on reimbursement, however, it found that Muth was entitled to recover some of the costs he incurred in litigating the merits, explaining:

> at the time the plaintiff moved for summary judgment, defendants opposed the award of tuition reimbursement, and it was not clear to me that reimbursement would be appropriate. I therefore deferred my decision on a remedy for the procedural

> violation until I was able to determine the appropriateness of the proposed I.E.P.'s. Thus, the plaintiff was required to litigate th merits of the proposed 1983-84 I.E.P. in order to win tuition reimbursement for that school year. Because the court in June considered the issues to be interrelated, the plaintiff was forced to incur additional attorney's fees. it (sic) would be unfair to penalize the plaintiff by applying hindsight to determine that the two issues had no common nexus of fact or law.

Memorandum and order of February 20, 1987, App. at 884.

An award of attorneys' fees in an EHA action is allowable under the Handicapped Children's Protection Act of 1986, Pub.L. No. 99-372, §2 codified at 20 U.S.C. §1415(e)(4)(B), when the

plaintiff is the prevailing party.[19] The governing standard for determining awards to partially prevailing plaintiffs is set by Hensley v. Eckerhart, 461 U.S. 424, 433, 440 (1983), which provides that "where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained."

---

[19] 20 U.S.C. S1415(e)(4)(B) reads:

> In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys fees as part of the costs to the parent or guardian of a handicapped child or youth who is the prevailing party.

We find the trial court's final decision unacceptable given the teachings of Hensley. Muth prevailed only on his procedural claims, and any award for attorneys' fees beyond those incurred in addressing that issue is an abuse of discretion. Accordingly, we remand for an allocation of attorneys's fees in accordance with the principles of Hensley.

VI.

For the reasons set forth above, we will affirm the judgment of the district court on every issue save that of the award of attorneys' fees, on which we will remand for a determination consistent with this opinion. Each Party to bear its own costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.		
MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al.	:	No. 84-2032

MEMORANDUM OPINION AND ORDER

HUYETT, J. JUNE 2, 1986

Presently pending before me in this action, based on the Education For All Handicapped Children Act (EAHCA), 20 U.S.C. §1401, is plaintiff's motion for summary judgment. By order dated November 18, 1985, I granted plaintiff leave to file a second amended complaint to raise certain issues which prior

counsel had omitted including the issue of whether Pennsylvania's administrative procedure used to determine the appropriate education for a handicapped minor, complies with the dictates of the federal EAHCA. Plaintiff has now moved for summary judgment on this issue. For the reasons which follow, I shall grant plaintiff's motion.

Section 615 of the EAHCA, 20 U.S.C. §1415, states in pertinent part that a parent of a handicapped child shall have an opportunity for an impartial due process hearing to challenge the educational program devised by the school district. This impartial due process hearing shall be conducted by the state educational agency, or by the local or intermediate educational agency as determined by state law. §1415(b)(2). If the hearing is conducted by the local educational

agency or an intermediate education agency, any party may appeal the findings and decision rendered in the hearing to the state educational agency. §1415(c). On appeal, the state educational agency shall conduct an impartial review of such hearing, and the officer conducting the review shall make an independent decision upon completion of such review. Id.

The regulations implementing §1415 track the statute's language and provide certain elaborations. For instance, the initial hearing must be impartial and therefore cannot be conducted "by a person who is an employee of a public agency which is involved in the education or care of the child." 34 C.R.F. §300.507. If the state establishes a two-tier system, i.e., if the hearing is conducted by a public agency other than the state educational

agency, the state educational agency may conduct an impartial review which shall include examining the entire administrative record, ensuring that the procedures at the hearing were consistent with the requirements of due process, and if appropriate, taking additional evidence.

Plaintiff in his motion for summary judgment contends that the Pennsylvania Administrative Procedure as set forth in the Pennsylvania Code and as applied in this case violates the due process requirements set forth in the EAHCA. Before examining plaintiff's contentions, however, it is necessary first to determine what the Pennsylvania Administrative Procedure is and how it was applied in this case.

The Pennsylvania Administrative Procedure is set forth in 22 Pa. Code §13.31 et seq. Section 13.32(2)

provides that a parent is to be notified of "the right to a full hearing before the Secretary or the designee of the Secretary." If a parent decides to request a due process hearing because there is no agreement as to the assignment of a child, the school entity must forward the request for a hearing to the Department of Education within ten days of the receipt of the request. §13.32(10). The hearing is then held in the school district and at a place convenient to the parent. §13.32(11). The hearing officer is assigned by the Secretary. §13.32(12). The decision of the hearing officer may be appealed to the Secretary of Education. §13.32(24).

In this case, plaintiff and the Central Bucks School District personnel were unable to agree on a proposal for the appropriate placement of plaintiff's

minor son, Alexander. On June 17, 1983, plaintiff requested a due process hearing to address the School District's failure to provide an "appropriate" education for Alexander. On September 30, 1983, a due process hearing was held before Hearing Officer Bernard Trent. On October 31, 1983, Mr. Trent issued his decision in which he concluded that Alexander was an extremely intelligent but severely learning disabled child who had not received an appropriate education; he further held that when developing a program for Alexander, the School District had to consider the potential to function within the gifted range and provide him with special activities and services not ordinarily provided in a regular program.

Both the School District and plaintiff appealed the Hearing Officer's decision to the Secretary of Education pursuant to 22 Pa.Code §13.32(24). The Secretary of Education remanded the case on January 23, 1984 to the Hearing Officer with instructions to the District to present additional information in the form of a revised Individualized Educational Program (I.E.P.) reflecting certain recommendations which had been made on June 17, 1983. Mr. Trent issued his final decision on July 25, 1984 in which he stated that modifications and adjustments which the Central Bucks School District made to the March 28, 1984 I.E.P. constituted an appropriate program for special education for Alexander. On appeal, the Secretary adopted the Hearing Officer's conclusions and dismissed plaintiff's

exceptions. This action arises from plaintiff's appeal of the Secretary's final decision.

Plaintiff argues first that the Pennsylvania process violates the "finality" requirement of the EAHCA. The basis for plaintiff's position is his contention that the due process hearing, which in this case was conducted by Mr. Trent, is a state level hearing. In support of this contention, plaintiff points to 22 Pa.Code §13.32(2) which states that due process hearings are to be conducted "by the Secretary or the designee of the Secretary." Under the Pennsylvania system, the state agency is also responsible for reviewing the hearing officer's findings and decision. However, pursuant to the EAHCA, §1415(c), an appeal may only be taken to the state agency if the hearing is conducted initially at the local or

intermediate agency level. Plaintiff argues, therefore, that because the hearing officer's decision in Pennsylvania is a state level decision, it should be final subject only to the review of the judicial system.

Plaintiff draws a parallel between the Pennsylvania process and several in other states which have been struck down as contravening federal law. In several of the cases, the findings and decisions of the hearing officers were characterized as special master reports to the Secretary of Education and therefore violated the finality rule. For instance, in Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), the court struck down use of a master's report at the state level when the state board of education could accept or reject the findings; this procedure failed to comply with the requirement that the

decision be final unless appealed to state or federal court. Plaintiff argues that the Pennsylvania process is similar to that aspect of the Georgia system which was struck down in Helms in that the initial hearing is a state level hearing which is then reviewed by the Secretary. The written procedures given to parents who wish to object to the report of the hearing officer support plaintiff's contentions. They specifically state: "A hearing officer's report constitutes Findings of Fact made by the hearing officer and a list of recommended orders (recommendations) which the hearing officer believes the Secretary of Education should adopt." See Attachment to plaintiff's motion for summary judgment. This provision certainly suggests that the hearing officer is an agent of the Secretary of Education

whose conclusions may be accepted or rejected.

Defendant Smith, in response to plaintiff's motion for summary judgment, argues that plaintiff's position with respect to the finality issue is based on two false assumptions: one, that the initial hearing is a state level hearing and two, that the hearing examiner's report is the report of a special master whose findings are not final. Defendant Smith contends that the Secretary is required by federal regulation to maintain a list of persons who shall serve as hearing officer. In support of this contention, defendant Smith points to 45 C.F.R. §121a.507 (1979). This section of the Code of Federal Regulations has been repealed and replaced by 34 C.F.R. §300.507(c); however, the wording has not been

changed. Nevertheless, this provision does not appear to support the Secretary's position. Section 300.507(c) states:

> Each public agency shall keep a list of the persons who serve as hearing officers. This list must include a statement of the qualifications of each such person.

This section does not require the Secretary of Education to keep such a list, and nothing in the provision suggests that the public agency referred to is necessarily the state educational agency. Rather, "public agency" as used in the regulations seems to refer to whatever agency conducts the hearing under the state system; this may be the state educational agency, the intermediate educational agency or the local agency.

Both defendants also contend that the due process hearing is actually conducted by the local educational agency because it is scheduled by the local agency, it is held in the local school district, and the school district has the burden of going forward at the hearing. Although this issue is close, I do not find these factors to be conclusive. The Pennsylvania Code specifically states that the parent has the right to a hearing before the Secretary or the designees of the Secretary. I am not sure what other meaning can be given to this provision other than that the initial hearing is conducted at the state level.

Even if I were to conclude that the original hearing is conducted by the local educational agency, I believe plaintiff would be entitled to summary

judgment because of the procedural flaws in the appeal process, particularly as it was applied in this case. As previously outlined, under the EAHCA, an appeal may be taken from a local level hearing to the state educational agency; the state agency "shall conduct an impartial review of such hearing." Moreover, "the officer conducting such review shall make an independent decision upon completion." 20 U.S.C. §1415(c). The corresponding regulations also provide that the state educational agency shall conduct an impartial review. 34 C.F.R. §300.510(b). Plaintiff contends that the state level review, like the initial due process hearing, must be conducted by impartial officers who are not employees of a public agency involved in the education or care of the child. Plaintiff

contends that this rule precludes the Secretary of Education from participating in the review process.

In Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), the court held that the term "impartial review" in §1415(c) means that review cannot be conducted by an employee of the Department of Public Instruction. In Grymes, the court was reviewing the Delaware administrative process under which the initial hearing was conducted by an impartial hearing officer appointed by the local educational agency. The hearing officer's ruling could be appealed to the State Board of Education; the state level review was conducted by an employee of the Department of Public Instruction. The court held that the legislative history supported the lower

court's determination that use of State Board employees as review officers contravened federal law.

The Senate Conference Report on §1415 specifically states:

> No hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing.

Senate Conference Report, 1975 U.S. Code Cong. & Ad. News, 94th Congress, First Session, pp. 1425, 1502. This language suggests that Congress was concerned that both the initial due process hearing and any subsequent review be conducted by an impartial individual.

In response, defendants contend that the Secretary of Education should not be classified as an employee of the Board because she is a high public official whose gubernatorial appointment distinguishes her from "employees" of the Board. The Secretary of Education is appointed by the Governor of the Commonwealth in accordance with the provisions of the Constitution of the Commonwealth of Pennsylvania. 71 P.S. §67.1(d)(1). The issue, therefore, is whether an individual holding a position provided for in the Pennsylvania Constitution is an employee of the public agency which he or she heads for purposes of 34 C.F.R. §300.507. Defendants rely on Brandon F. v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740, 746 (E.D. Wis. 1984) in which the court held that the Superintendent of Public Instruction

was a constitutional officer in the State of Wisconsin and not a school employee and therefore that the Superintendent was qualified to conduct an appeal of the due process hearing under 20 U.S.C. §1415. Similarily, the court in Victoria L. by Carol A. v. District School Bd., 741 F.2d 369, 374 (11th Cir. 1984), dismissed the argument that the Florida Commissioner of Education could not conduct a review of the hearing findings as frivolous.

A careful examination of the purpose behind the regulation that employees of the public agency involved in the education or care of the child may not conduct the state level review suggests that the court's decisions in Brandon E. and Victoria L. may have been misguided. Congress was concerned that handicapped minors and their parents be

assured impartial review. To this end, they want to ensure that the individuals conducting the reviews be as free from political and fiscal pressures as possible. In the Senate Conference Report, it was specifically pointed out that: "any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer..." Senate Conference Report, 1975 U.S. Code Cong. & Ad. News, 94th Congress, First Session, pp. 1425, 1502. Congress made it clear that it intended this language to apply to both local level hearings and state level reviews.

Although the Secretary of Education may not technically be an employee of the Department of Education, I nevertheless conclude that she must be considered an employee of Pennsylvania's

state educational agency for purposes of 34 C.F.R. §§300.510 and 300.507(a). She directly exercises both fiscal and regulatory control over the school district and as plaintiff notes, is at least as involved in the education of handicapped children as were the employees of the Delaware Department of Public Instruction in Grymes. See also Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980); Vogel v. School Board of Montrose R-14 School District, 491 F.Supp. 989, 994-95 (W.D. Mo. 1980).

An additional procedural irregularity occurred in this case which plaintiff has not raised but which I believe is important considering the flaws identified in the Pennsylvania administrative process. After the initial due process hearing before

Mr. Trent, both plaintiff and the School filed an appeal to the state level. On appeal, the Secretary of Education did not issue a final order; he remanded the case on January 23, 1984 to the Hearing Officer with an instruction to take additional evidence to address recommendations that had been made to review the I.E.P. On remand, after hearing the additional evidence, Mr. Trent issued a decision in favor of defendant school district. Plaintiff again filed an appeal, and the Secretary affirmed the Hearing Officer's decision.

Nothing in the EAHCA or the accompanying regulations provides for the remanding of a case from the state level to the local level for the taking of additional evidence. Rather, 34 C.F.R. §300.510(b) specifically

states that the "state educational agency shall conduct an impartial review of the hearing." Subsection (3) suggests that the official conducting the state level review may want to seek additional evidence but nothing in the provision suggests that the case should be remanded for additional hearing; any additional hearings are to be conducted at the state level with the same rights accorded to parents as in the initial due process hearings. Comment 1 to 34 C.F.R. §300.510 provides that although the state agency may rely on another state agency to conduct the review, it remains responsible for the final decision on review. This reiterates the conclusion that the state agency may not simply remand the case to the local level for additional hearings. In fact, the Secretary's

action in remanding the plaintiff's case to Mr. Trent supports plaintiff's theory that the hearing officer is nothing more than a special master whose report and findings the Secretary may accept or reject.

Defendants contend that plaintiff's challenge to the Pennsylvania administrative process as applied in this case must fail because he failed to raise these issues during the administrative process. However, because it would probably have been futile or plaintiff to raise these claims about the manner in which the Pennsylvania process contravened federal law when he was attempting to use that process for his son's benefit, I do not believe it is appropriate to bar plaintiff from raising these claims now.

Having concluded that the Pennsylvania administrative process, particularly as it was applied in plaintiff's case, contravenes federal law, the issue becomes what is the next appropriate step in this action. Plaintiff contends that given the procedural flaws I should order the payment of tuition reimbursement for the years in which his son has been at the private Landmark School and should order defendants to continue such payments in the future, i.e. to order that Alexander's appropriate placement is the Landmark School. In support of this position, plaintiff contends that the first decision of Hearing Officer Trent, the decision favoring plaintiff, should be given great weight; plaintiff also contends that defendants have never appealed from this first decision.

However, it is my understanding that the first appeal to the Secretary was a cross appeal filed by both plaintiff and the School District.

As the court noted in Grymes v. The State Board of Education, No. 79-55, slip op. at 7-8 (D.Del. January 7, 1971), procedural errors in an administrative proceeding may often require the remanding of the action to the agency to take corrective action. However, the EAHCA provides for a form of judicial review which makes remand unnecessary. Pursuant to Section 1415(e)(2), the court may make an independent decision based on the administrative record and any additional evidence submitted by a party and based on the preponderance of the evidence. Moreover, in this action, I am very concerned by the excessive delays which have occurred which may have operated to

plaintiff's detriment. I do not believe it is appropriate for me to order tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff's son with an appropriate free education.

In order to put this case in the same position it would have been in if the procedural flaws had not occurred, I will treat the hearing as an appeal from Officer Trent's first decision by the School District. The School District will therefore have the burden of going forward and establishing that the I.E.P. they proposed would be appropriate. The failure of the state and the School District to comply with the procedural requirements of the EAHCA including the excessive delays will certainly be a

factor for me to consider when determining what relief, if any, is appropriate.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

ORDER

NOW, June 2, 1986, upon consideration of plaintiff's motion for summary judgment, defendant's responses, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that plaintiff's motion for summary judgment is GRANTED IN PART. Judgment is entered in favor of plaintiff and against defendants as to plaintiff's claim that the Pennsylvania

administrative procedure contravenes federal law. IT IS FURTHER ORDERED that a conference shall be held in the case on June 24, 1986 at 1:30 p.m., in chambers (Room 12614), U.S. Courthouse, Phila., PA.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER

HUYETT, J. AUGUST 28, 1986

Plaintiff Russell A. Muth, individually and on behalf of his minor child, Robert Alexander Muth, brought this action seeking declaratory and injunctive relief against the Secretary of Education for the Commonwealth of Pennsylvania, Margaret A. Smith, the Central Bucks School District and Dr. Thomas L. Newman, Superintendent of the Central Bucks School District. The

following constitutes my findings of fact.

1. I incorporate by reference the uncontested stipulation of facts entered into by all of the parties.

2. Robert Alexander Muth ("Alexander") is a minor who has been diagnosed as having specific learning disabilities and experiences auditory perceptual dysfunction and secondary emotionality. In addition to a neurologic impairment and a language learning disability (dyslexia), Alexander also suffers from a low self-esteem and related emotional problems. His disability manifests itself in receptive and expressive language weaknesses.

3. Margaret A. Smith is the Secretary of Education of the Commonwealth of Pennsylvania, and as

such, is the head of the state educational agency ("SEA"), as defined in 20 U.S.C. §1401(7).

4. Defendant Thomas L. Newman is the Superintendent of the Central Bucks School District, the "local educational agency" ("LEA"), as defined in 20 U.S.C. §1401(8).

5. Defendant Central Bucks School District ("District") is the LEA which is charged by the Education For All Handicapped Children Act, 20 U.S.C. §1401 with providing Alexander Muth a free appropriate public education.

6. Alexander was enrolled for the first time in the Central Bucks School District in September 1980. His previous education had been in Spanish as he had been living with his mother in Columbia, South America.

7. When he arrived in Philadelphia, Alexander was tested by Dr. Thomas

Atkins, a clinical psychologist at Children's Hospital. As of the date of that testing, July 1980, the following Wide Range Achievement Test scores were obtained: reading -- 2.0 grade equivalent; spelling -- 1.9 grade equivalent; and mathematic computation -- 3.5 grade equivalent.

8. During the 1980-1981 school year, Alexander was placed in the learning disabilities resource room.

9. Alexander was mainstreamed for art, physical education, lunch and recess with 5th grade students and was mainstreamed in music and library with 4th grade students.

10. Alexander's father approved the individualized education program plan ("I.E.P.") for the 1980-81 year.

11. The I.E.P. was revised in February 1981 with the approval of

Alexander's father. Under the revised I.E.P., Alexander remained in the learning disabilities resource room. In addition, he received speech therapy, adaptive physical education, and English as a second language tutoring.

12. Alexander was tested again in March, 1981 by Elizabeth Fallon, a certified school psychologist. Alexander's scores on the Wide Range Achievement Test had improved as follows. Reading from grade 2.0 level to grade 3.2 level; spelling from grade 1.9 equivalent to a 2.4 grade equivalent; and mathematic computation from grade 3.5 equivalent to a 4.1 grade equivalent.

13. For the 1981-1982 school year, Alexander was again placed in the learning disabilities resource

classroom. He also received speech therapy as a special service.

14. In February, 1982, Fallon administered a Wechsler Intelligence Scale for Children -- Revised and noted a verbal I.Q. of 98, a performance I.Q. of 139, and a full-scale I.Q. of 120.

15. In February 1982, Fallon also again administered the Wide Range Achievement Test. At this time, Alexander obtained scores of 3.8 grade equivalent in reading; 2.4 grade equivalent in spelling and 4.1 grade equivalent in mathematic computation.

16. Fallon noted that Alexander had diminished self-esteem, and she recommended counseling for Alexander. Due Process Hearing, September 30, 1983, Tr. 72-75.

17. Alexander enrolled in the Lenape Junior High School in the Central Bucks District in September 1982. He was

again placed in a learning disabilities resource room. He was mainstreamed in physical education, art, music, and library.

18. Between the spring of 1982 and June 1983, Ms. Fallon counseled Alexander on approximately 40 occasions. These sessions were either with Alexander individually or with both Alexander and his father, and several took place over the telephone. Due Process Hearing, September 30, 1983, Tr. 72-75.

19. Vincent Talerico testified at trial in a straight-forward and sincere manner. I found his testimony to be credible.

20. Talerico first became involved with Alexander in November 1982 in the resource room. Alexander was experiencing some problems because he

felt stigmatized by his placement in the learning disabilities classroom.

21. During the 1982-1983 school year, Alexander was absent 33 days. Due Process Hearing, September 30, 1983. Tr. 16.

22. During the school year, Alexander expressed a desire to be mainstreamed. He expressed the belief that he could do well in a normal program to Ms. Fallon.

23. In March 1983, the Wide Range Achievement Tests were again administered. Alexander's scores showed an improvement in all three subjects tested. His reading score improved from a 3.8 grade equivalent in 1982 to a 4.9 grade equivalent; his spelling rose from 2.5 to 3.9, and his mathematic computation rose from 4.1 to 6.4.

24. In March 1983, with the request of Alexander's father, the multi-disciplinary team agreed to mainstream Alexander in science and English as of March 11, 1983 on a diagnostic basis only.

25. Alexander continued to receive specialized speech services and resource room instruction in reading and mathematics. Throughout the mainstreaming trial, Alexander was closely monitored by Ms. Fallon, Vincent Talerico, his special education teacher, and his guidance counselor.

26. An aide accompanied Alexander to his English and science classrooms and worked with him on his assignments in extra periods. Due Process Hearing, September 30, 1983, Tr. 111.

27. Mr. Talerico testified that although Alexander was initially very motivated in the mainstream class, after the first two weeks, he became increasingly frustrated and fell behind in his work. His frequent absences are believed to have contributed to his problems in the mainstream program.

28. To improve Alexander's self-esteem, Ms. Fallon and Mr. Talerico attempted to get Alexander involved in extra curricular activities such as Boy Scouts, Little League, and track, but Alexander's father was reluctant to give his permission for such activities. Due Process Hearing, September 30, 1983, Tr. 81-82.

29. On June 17, 1983, the multidisciplinary team again met with Mr. Muth and advised him that it was the team's conclusion that mainstreaming had

been unsuccessful and that for the 1983-1984 school year, it was their recommendation that Alexander be returned to the learning disabilities resource room for English and science as well as his other substantive subjects. At the June 17, 1983 meeting, no I.E.P. was formed for the 1983-1984 school year; it was decided that the I.E.P. would be formed in September at the beginning of the academic year.

30. Immediately after the conference on June 17, 1988, Mr. Muth requested a due process hearing. By letter dated August 15, 1983 to Dr. Laws of the Central Bucks School District, Mr. Muth specifically requested the School District to make no further changes in the I.E.P. for his son. As he noted, any changes would constitute a violation of Pennsylvania law.

31. Alexander attended Lenape for two days at the beginning of the 1983-1984 school year. He was then withdrawn from Lenape and placed at the Landmark School in Prides Crossing, Massachusetts. He has not attended school in the Central Bucks District, therefore, since the 1982-1983 school year.

32. A due process hearing was held on September 30, 1983 before Hearing Officer Vernard Trent. A transcript of this hearing was admitted into evidence at trial. Trent commenced the hearing by stating that he was serving as a designee for the Secretary of Education and the hearing was to determine if the I.U. (Intermediate Unit) had offered or afforded Alexander an appropriate educational program.

33. Mr. Muth attended the due process hearing and acted as his own counsel.

34. On October 31, 1983, Trent rendered his decision. He did not order Alexander's placement in a particular program, but he did require the District to provide "special activities or services not ordinarily provided in the regular program." Trent found that although th I.E.P. addressed Alexander's perceptual dysfunction, this information was not translated into instructional strategies and classroom activities. He also concluded that Alexander needed help coping with his socio-emotional difficulties which could be provided through intensive counselling, crisis intervention and an effective program of behavior. Trent also recommended that consideration be given to Alexander's

potential to perform within the gifted range. See CB Ex. 15.

35. Both the School District and Mr. Muth appealed Trent's decision.

36. On January 23, 1984, the Secretary of Education remanded the case to the Hearing Officer and ordered Central Bucks to present additional evidence in the form of a revised I.E.P. to reflect the modifications proposed at the June 17, 1983 conference by the multidisciplinary team.

37. On March 28, 1984, an I.E.P. conference was held. Mr. Muth was unable to attend so only the multidisciplinary team was present.

38. Mr. Muth refused to authorize the release of Landmark records to Central Bucks.

39. Another I.E.P. conference was held at Mr. Muth's request on April 27, 1984 at 6:00 a.m. Some revisions to the

I.E.P. proposed by the multidisciplinary team were made.

40. A revised I.E.P. was issued on May 1, 1984. C.B. Ex. 12. A Notice of Recommended Assignment ("NORA") was sent to Muth on May 1. Plaintiff Muth did not accept this I.E.P., and requested another due process hearing.

41. The hearing before Trent was reconvened on June 7, 1984.

42. On July 25, 1974, Trent issued his decision approving the revised I.E.P.

43. Mr. Muth appealed Trent's decision.

44. On October 24, 1984, Margaret A. Smith, Acting Secretary of Education, adopted Trent's decision.

45. Under the revised I.E.P. for 1983-1984, Mr. Talerico would have been Alexander's learning disabilities teacher. Because, Alexander's strengths

were in the visual area, Mr. Talerico proposed to use a teaching methodology referred to as visual, auditory, and kinesthestic tactile modes or VAKT.

46. Mr. Talerico also intended to emphasize Alexander's creative development by using problem solving and brainstorming techniques.

47. Alexander would have been placed in classes which would have had at most 12 students but usually no more than 5 to 7. In addition to the learning disabilities teacher, each class would also have had an aide to assist the students on a one-to-one basis.

48. Mr. Talerico also testified that Alexander would have received approximately 60 minutes per day of one-to-one attention in the classroom.

49. Psychological counseling was available at Central Bucks School District to address not only problems

Alexander may have been having in school but also problems at home.

50. For each subject matter, the revised I.E.P. set criteria for successful performance. For instance, in reading, for structual analysis skills, the goal was 80% accuracy while for decoding skills the goal was 90% accuracy. Achievement of these goals was to be monitored by teacher observation in class, grading of daily assignments and unit tests.

51. In September 1983, Alexander was enrolled in the Beverly Farms program of the Landmark School. This program is designed for children with language disabilities, and it offers an intensive language based program. All of the children enrolled in the program have a discrepancy between their verbal and performance IQs.

52. The Landmark School developed an I.E.P. for the 1983-1984 school year; a copy of this I.E.P. was admitted at trial as C.B. Ex. 5.

53. The Landmark School I.E.P. for 1983-1984 emphasized the use of the VAKT program which is the same methodology Mr. Talerico proposed to use at the Lenape School.

54. Karl Pulkinnen, program director for the North Campus of the Landmark School testified at trial. I found him to be a qualified witness who testified in a candid and sincere manner.

55. The Landmark School I.E.P. also emphasized the use of one-to-one tutorials. Mr. Pulkinnen testified that Alexander spent approximately 45 minutes per day in a one-to-one tutorial. On cross-examination, however, Pulkinnen stated that the tutor might or might not be a certified special education teacher

or even a certified teacher. The tutors, however, do receive intensive training for ten days each summer with three-day review sessions during the school year.

56. The goals and objectives set forth in the I.E.P. prepared by the Landmark are very similar to the goals and objectives set forth in the revised I.E.P. prepared by Central Bucks.

57. After the normal school day at Landmark, there is a supervised homework-make-up period which a child must attend if he or she has not completed the day's assignments. In the evenings, there is a supervised study hall which is monitored by the same staff which is involved in the teaching.

58. Landmark offers pre-vocational programs to reinforce motor skills.

59. Mr. Pulkinnen agreed that goals set forth in the Central Bucks I.E.P. were appropriate but he believes that the method for implementing them would not be as effective as the language based approach used at the Landmark School.

60. Dr. William Adamson, a psychiatrist at the University of Pennsylvania Medical School testified at trial. I found him to be well-qualified. He testified in a candid and forthright manner, and I found him to be a credible witness.

61. Dr. Adamson first evaluated Alexander in the spring of 1983 and determined that Alexander had several problems including a neurological impairment, a severe learning disability and low self-esteem which Dr. Adamson referred to as a narcissistic wound.

62. Dr. Adamson recommended the Landmark School to Mr. Muth because it has an intensive language-based program.

63. Dr. Adamson has continued to see Alexander since the spring of 1983. He noted a change in Alexander after his first few months at the Landmark School, particularly in his emotional state; Alexander was initially "happy" at Landmark.

64. Dr. Adamson, on cross-examination, described the relationship between Alexander and his father, Russell Muth, as that of "two ships passing in the night." Alexander evidently at times feels a sense of rejection arising from the separation of his parents and the communication problems with his father.

65. On March 28, 1985, Alexander was removed from the Landmark School. His school records do not reveal the reason for Alexander's withdrawal, but Dr. Adamson testified that Alexander had told him that he left because things had been stormy at Landmark in the fall of 1984. Alexander had met a girl who, shortly after Christmas holiday, broke up with Alexander. This was another blow to his self-esteem and caused him to "hate" Landmark.

66. Alexander was enrolled at the Wyncote Academy on April 15, 1985 in a regular education program.

67. Wyncote Academy provides no special education or support services for children with learning disabilities.

68. Dr. Adamson visited Wyncote and met with Alexander's teachers to discuss how to assist Alexander in class, but

this was the limit to the special provisions made for Alexander at Wyncote.

69. Alexander remained at Wyncote for the 1985-1986 school year. Alexander maintained a passing average at Wyncote.

70. At my request, Central Bucks prepared a proposed I.E.P. for the 1986-1987 academic year.

71. The assignment proposed by Central Bucks for the 1986-1987 school year would be the Central Bucks East High School.

72. Under the proposed I.E.P., Alexander would spend one-half of his day in a learning disabilities classroom for his major subjects and one-half a day either in a vocation-technical program at the area vo-tech school or in electives.

73. Bruce Taylor, Supervisor of Special Education, testified at trial in a candid and professional manner, and I found him to be a credible witness.

74. Mr. Taylor was involved in the preparation of the proposed 1986-1987 I.E.P. for Alexander. The I.E.P. is based on Alexander's records from Landmark and Wyncote and an evaluation of Alexander performed by Dr. Atkins. See C.B. Ex. 8.

75. Dr. Atkins concluded in his report that Alexander does not have much interest in academic work, but that he has "very exceptional nonverbal abilities and interests that might be better addressed and capitalized on in alternative vocational or technical school setting."

76. Alexander would be placed in the 11th grade. There would be approximately 23 learning disabled

students in the 11th grade program spread over three classrooms. Each class would have one certified special education teacher and one teacher's aide.

77. Alexander would be evaluated for participation in the gifted program. Under this program, a student may be assigned to a volunteer professional who will serve as the student's mentor in the particular area of expertise, e.g. art.

78. Alexander will be assigned a guidance counselor. In addition, social counseling and school psychologists will be available.

79. In developing the I.E.P. for 1986-1987, Central Bucks has borrowed the objectives set by the Landmark School in the last I.E.P. it prepared for Alexander. Emphasis will be placed on the VAKT approach previously proposed

by Mr. Talerico to tackle Alexander's language based problems, particularly with decoding.

80. Use will also be made of computer software packages which are designed specifically for learning disabled children.

81. Alexander's progress will be evaluated by day-to-day teacher observation, periodic tests as well as a pre and post testing program.

82. The program proposed for Alexander is highly structured and will provide for individual instruction.

83. As well as focusing on specific subject matter, the program prepared for Alexander will also focus on developing study skills.

84. Tutoring is not provided by the school district, but individual,

one-to-one instruction will be available in the classroom.

85. If Alexander elects to attend the vo-tech school, support services will be provided because the vo-tech program is part of the regular education program.

86. It is unlikely that Alexander would be able to participate in the technical courses offered at the vo-tech school because he will not be able to take the prepatory math course which is a prerequisite.

87. If Alexander does not elect the vo-tech program, he would have a number of electives to chose (sic) from for which he would be mainstreamed.

88. Dr. Robert Laws testified at trial. He too was candid and testified in a sincere and forthright manner.

89. Dr. Laws is a certified school psychologist who has a Ph.D. in educational administration.

90. Dr. Laws testified that in his opinion the I.E.P. proposed for 1986-1987 was appropriate because it is geared towards maximizing Alexander's strengths and it is a less restrictive placement. Dr. Laws emphasized the need for Alexander to have contact with regular education students.

91. Dr. Laws noted that Alexander's progress at the Landmark School followed the pattern of his progress at the Central Buck's (sic) schools. In both cases, he made initial strides, but then showed problems in adjusting to the program. Alexander shows a problem with accepting constructive criticism and has a low level of self-motivation.

92. Dr. Laws also emphasized the emotional problems Alexander has and the need for him to build a relationship with his father which would not be possible if he were placed in a residential program in Massachusetts.

DISCUSSION

Plaintiff filed this action on April 27, 1984 pursuant to the Education for All Handicapped Children Act ("EAHCA" or the "Act"), 20 U.S.C. §1415(e)(2).[1] Plaintiff presently seeks a declaration that the 1983-84 Individualized

---

[1]Plaintiff's initial complaint also contained claims pursuant to §504 of the Rehabilitation Act, 29 U.S.C. §794 and the equal protection and due process clauses of the fourteenth amendment. Plaintiff later dropped these claims as the EAHCA was intended as the exclusive remedy for vindicating the rights of handicapped children to a free appropriate education. When plaintiff's filed their second amended complaint, they sought to include a claim pursuant to the due process clause for $25,000 in damages. I declined to grant leave to amend to add this claim. See order, November 18, 1985.

Education Program ("I.E.P.") prepared by Central Bucks School District was inappropriate, reimbursement for tuition at the Landmark School for the 1983-1984 school year and part of the 1984-1985 school year, and an order that the appropriate placement for the 1986-1987 school year is the Landmark School. Plaintiff also seeks attorney's fees.[2]

---

[2]It is not clear from the proposed second amended complaint whether there are two plaintiffs or only one. In several places in the complaint, the term "plaintiffs" is used, but paragraph III.1 of the amended complaint states in pertinent part: "[the plaintiffs are Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child..." From this language it appears that only the father is the plaintiff despite the use of the plural. Therefore, throughout the memorandum opinion I shall refer to only one plaintiff which is consistent with the caption on the original complaint.

After numerous delays caused in part by the change in plaintiff's counsel mid-way through this litigation and the filing of a second amended complaint which raised new procedural issues, a three-day trial of this matter finally commenced on August 11, 1986. Because another school year begins next week, I have tried to expedite resolution of this matter, while still reviewing carefully all of the evidence submitted to me. Cases of this type are always difficult because of the emotional element involved and the fact that the future of a child is in issue.

The Education for All Handicapped Children Act, 20 U.S.C. §1401 et seq., provides federal monies to state and local agencies to assist in the education of handicapped children. Receipt of such monies is conditioned on the state's compliance with the

extensive procedures and goals of the Act. To qualify, a state must demonstrate that it "has educational benefit to the handicapped child." Id. at 201. The Court specifically held that the Act does not require that a particular substantive level of education be provided or that the services be sufficient to maximize each child's potential. Id. at 198.

The EAHCA establishes a process through which a parent may challenge the educational program developed by the School District for his or her child. Under the Act, any party aggrieved by the findings and decision of the administrative hearings may file a civil action in federal court. In reviewing the proceedings below, the court "shall receive the records of the administrative proceedings, shall hear

additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relieve as the court determines is appropriate." 20 U.S.C. §1415(e)(2).

1983-1984

The first issue plaintiff presents for me to resolve is whether the I.E.P. for the 1983-1984 school year was appropriate. Application of the standard of review established in §1415(e)(2) is complicated by the procedural history of this case. Plaintiff, Mr. Muth, requested a due process hearing on June 17, 1983, before an I.E.P. for the 1983-1984 school year had been prepared in final form. At the conference on June 17, 1983, the multidisciplinary team advised Mr. Muth of the modifications the team proposed

to make in the plan that had been effect between March and June 1983, i.e. that Alexander be removed from the mainstreaming program and returned to the learning disabilities resource room, but these modifications were not incorporated into an I.E.P. at that time. Upon appeal, the Secretary of Education ordered Central Bucks to prepare a revised I.E.P. to reflect the modifications proposed at the June 17 conference and remanded this case to the Hearing Officer.

At trial, counsel for plaintiff objected to the introduction of any evidence pertaining to the revised 1983-1984 I.E.P., arguing that my review should be limited to the I.E.P. considered by Hearing Officer Trent at the first due process hearing on September 30, 1983. I note that in my memorandum opinion of June 2, 1986,

I held that because of the serious procedural flaws that had occurred in the administrative process, I would treat this case as an appeal from Trent's first decision. Because Trent had ruled that the I.E.P. then in existence was inappropriate, I concluded that the burden of proving that program to be implemented for the 1983-1984 school year was appropriate, properly belonged to defendant Central Bucks. See Town of Burlington v. Dept. of Educ., Com. of Mass., 736 F.2d 773, 794 (1st Cir. 1984). However, the Act contemplates that the administrative hearing record will be supplemented at the time of trial; the issue here is what additional evidence should be received. In resolving this issue, consideration must be given to the fact that my role under §1415(e)(2) is to conduct something more

than a review of the administrative process but less than a full trial de novo. Rowley, 458 U.S. at 205.

Given the procedural history of this case, evidence pertaining to the revised 1983-1984 I.E.P. was properly received into evidence, and I will consider it in determining whether the 1983-1984 I.E.P. was appropriate. I note that after filing his request for a due process hearing, Mr. Muth specifically instructed Central Bucks to refrain from making any further revisions in Alexander's I.E.P.; moreover, under Pennsylvania law, no changes could be made in the I.E.P. pending the outcome of the due process hearing. Therefore, no I.E.P. incorporating the modifications proposed by the multidisciplinary team at the June 17, 1983 conference was prepared until it was ordered by the Secretary of

Education. Yet, the issue here is whether the program Central Bucks intended to implement during the 1983-1984 school year was appropriate. Evidence of what the multidisciplinary team had proposed as early as June 17, 1983 is proper "additional evidence for me to consider in fashioning "appropriate" relief.

In reviewing the administrative record and additional evidence, I must give "due weight" to the administrative proceedings. Rowley, 458 U.S. at 206. Because I have held that my review will commence from the point of Hearing Officer Trent's first decision, plaintiff contends that I should conclude, as did Trent, that the 1983-1984 I.E.P. was inappropriate. However, I am not bound by his decision, and as I have noted, I may consider

appropriate additional evidence when evaluating the program Central Bucks intended to employ for Alexander in the 1983-1984 school year.

Central Bucks introduced Alexander's standardized test results for the years he had been at Central Bucks schools. These test results show that, although Alexander had not progressed as steadily or rapidly as might be desired, he made consistent progress. For instance, between 1980 and 1983, on the Wide Range Achievement Test, his reading score rose from a 2.0 grade equivalent to a 4.9 grade equivalent while his mathematical computation score rose from a 3.5 grade equivalent to a 6.4 grade equivalent. Alexander had clearly benefited from the instruction and special services he had received at Central Bucks between 1980 and 1983.

At trial, Central Bucks presented not only the 1983-1984 revised I.E.P. but also the testimony of Vincent Talerico, the special education teacher who would have had principal responsibility for Alexander's education. For the 1983-1984 school year, the multidisciplinary team recommended that Alexander's mainstreaming be limited to his elective courses and that he be returned to the learning disabilities classroom for his substantive subjects. Vincent Talerico testified that Alexander would have attended classes ranging from 5 to 11 students and that he would have received approximately 60 minutes per day of one-to-one instruction. The material conveyed to him would have tracked that presented in the regular education 8th grade level curriculum. Talerico also testified that he intended to employ a

teaching methodology called visual, auditory and kinesthestic tactile modes (VAKT) to take advantage of Alexander's strengths in the visual area; interestingly, it was precisely this methodology that was employed at the Landmark School during the 1983-1984 school year. Talerico is a certified special education teacher who has extensive experience with teaching children with disabilities like Alexander's.

As the revised I.E.P., C.B. Ex. 12, reflects, Alexander's progress would have been monitored by daily, teacher observation, grading of daily assignments, and frequent in-class testing. In addition to the attention given to Alexander's academic needs, Central Bucks was cognizant of Alexander's need to interact with regular education students; therefore,

Alexander would have been mainstreamed for art, music, physical education and lunch. Such mainstreaming is consistent with the preference set forth in the Act for the least restrictive alternative for the handicapped child. §1412(5).[3]

---

[3]Section 1412(5) states in pertinent part:

> The State has established (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special education classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, ...

Psychological counseling would also have been available for Alexander. During the previous year, 1982-1983, Alexander had met with or otherwise communicated with Elizabeth Fallon, a certified school psychologist, approximately forty times. This counseling was intended to help Alexander cope with not only any frustrations he developed in the classroom but also problems he faced at home. All of the experts who testified at trial identified Alexander's lack of motivation as a key stumbling block to his academic progress. Counseling such as that Central Bucks proposed was to enable Alexander to concentrate on his academic studies.

Hearing Officer Trent, in his decision of October 31, 1984, concluded that the mainstreaming program was not appropriate for Alexander's needs, and

he recommended that a more restrictive educational setting be explored. The multidisciplinary team had reached the same conclusion by June 17, 1983. Trent also recommended that Alexander's significant auditory perceptual dysfunction be translated into instructional strategies and classroom activities; this recommendation would have been followed by the school through the VAKT methodology Talerico intended to use. Finally, Trent recommended that Alexander's potential for performance in the gifted range be developed. In response, Central Bucks stated that upon enrollment Alexander would be evaluated for eligibility in the gifted program. Trent did not recommend placement at a private school.

Considering the conclusions and recommendations of Hearing Officer Trent, the additional evidence

presented by Central Bucks, the progress Alexander had made at Central Bucks between 1980 and 1983, and the program Central Bucks was prepared to implement based on the recommendations of the multidisciplinary team at the June 17, 1983 conference, I conclude that if it had been implemented, the program Central Bucks was prepared to provide for Alexander would have afforded him an appropriate education. Central Bucks would have provided personalized instruction with sufficient support services to permit Alexander "to benefit educationally from that instruction." Rowley, 458 U.S. at 203.

Procedural Flaws

I must now consider what effect, if any, the procedural flaws which I identified in my memorandum opinion of

June 2, 1986 have on the appropriateness of the I.E.P. which Central Bucks proposed for the 1983-1984 school year. As I noted in my earlier memorandum opinion, the failure of the school district and the Commonwealth to comply with the procedural requirements of the EAHCA are certainly factors for me to consider in determining what relief is appropriate.

In Rowley v. Bd. of Education, 458 U.S. 176 (1982), the Court posed two questions which must be addressed in all actions filed challenging a state administrative process: First, has the State complied with the procedures set forth in the Act, and second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Because there was really no question that the state in Rowley had complied with the procedural requirements of the Act, the Rowley court did not address the issue of what relief is appropriate when specific procedural violations have been identified. However, the Court did emphasize the importance of the procedural safeguards built into the Act. "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., §§1415(a)-(d), as it did upon the measurement of the resulting I.E.P. against a substantive standard." Rowley, 458 U.S. at 205-06.

In Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996, 2003

(1985), the Court, holding that tuition reimbursement for private school placement may be appropriate, emphasized that a district court has broad discretion in fashioning the relief appropriate to give effect to the purposes of the Act. In this case, the procedural violations identified resulted in the due process procedure dragging on for more than one year. Mr. Muth filed his request for a due process hearing on June 17, 1983. A final administrative ruling was not made until the Secretary of Education adopted Hearing Officer Trent's second decision on October 24, 1984, more than a year and four months later.

The regulations implementing the EAHCA provide strict time limitations for the administrative due process procedure. 34 C.F.R. §300.512.

First, the due process hearing officer's decision is due not more than 45 days after the hearing. Second, the state educational agency shall ensure that "not later than 30 days after the receipt of a request for a review: (1) a final decision is reached in the review." Clearly, no final decision was reached within the 30 days. Rather, the Secretary of Education remanded for further development of the I.E.P., and the due process procedure essentially began all over. Because of these delays, Mr. Muth did not receive a final determination as to the propriety of the proposed I.E.P. within the time limits set by the Act; he never agreed to any extension of time, and there is no indication in the record that either party formally asked for an extension of time.

Mr. Muth's right to have a promptly review of he (sic) program proposed for his son was therefore negated. Moreover, as I noted in any memorandum opinion of June 2, 1986, there is no provision in the Act for the Secretary of Education to remand a case after an appeal is filed. He or she must make an independent decision based upon the record developed at the due process hearing and any additional evidence received. 34 C.F.R. §300.510(b). This decision is to be made promptly so that the parent may proceed to judicial review if appropriate. Furthermore, as I concluded in my June 2, 1986 memorandum, it appears that under the Pennsylvania administrative scheme, the initial due process hearing was conducted at the state level. Given this fact, no appeal to the Secretary of Education may properly be taken.

Therefore, the decision of Trent on October 31, 1983 should have been the final step before judicial review. The question raised is whether the year long delay resulting from the procedural flaws in the state administrative process caused plaintiff any harm for which a remedy is appropriate.

Central Bucks argued that because Mr. Muth had decided before the June 17, 1983 I.E.P. conference to send his son to Landmark School for the 1983-1984 school year, as evidenced by the application Landmark received on June 14, 1986, plaintiff was not harmed in any fashion by the procedural flaws which I have identified. However, under the Court's analysis in Burlington School Committee v. Dept. of Educ., 105 S.Ct. 1996 (1985), it is clear that a parent has the right to remove his or her child from public school in favor of

private school placement pending the outcome of the review of the contested I.E.P. Admittedly, the parent acts at his own financial risk, Burlington, 105 S.Ct. 15 2005; however, no inferences adverse to the father can be drawn from the fact that he withdrew Alexander from Central Bucks and placed him at Landmark. He remained entitled to an expeditious and proper resolution of his challenge to the I.E.P.

As the Court in Rowley emphasized repeatedly the procedural safeguards established in the Act are very important and are to be strictly construed. The system is to provide due process which was not provided in this instance. In Hall v. Vance Cty. Bd. of Educ., 774 F.2d 629 (4th Cir. 1985), the court held that the school officials' failure to provide notice to the parents of their procedural rights under the

EAHCA was adequate grounds for holding that the school failed to provide the student with a free appropriate public education in violation of the Act. Defendants contend that Hall must be distinguished on the grounds that in Hall the court also concluded that the I.E.P. proposed by the school district did not provide an appropriate education for the child. In other words, both of the Rowley questions were answered in the negative. While that distinction may warrant an adjustment in the nature or scope of the relief, I do not believe it affects the applicability of the central holding of Hall which is that serious violations of the procedures mandated by the EAHCA may render an I.E.P. inappropriate.

Defendants, relying on Cain v. Yukon Public School, 775 F.2d 15 (10th Cir. 1985) and Scituate School Committee v.

Robert B., 620 F.Supp. 1124 (D. R.I. 1985), contend that the procedural defects which occurred in this case, if any, were purely technical and caused no harm to plaintiff. However, I cannot accept this contention. The flaws in the administrative process applied in this case caused the whole process to drag on for over a year. During that period, Mr. Muth had no opportunity to control or participate in the process which directly affected his son's education. Parental input and participation in the shaping of an education program for a child is the cornerstone of the EAHCA. Accordingly, I conclude that plaintiff is entitled to some sort of relief in this case.

The difficult part is shaping appropriate relief under all of the circumstances. Applying the Rowley questions, the state failed to abide by

the procedures set forth under the Act, but the school was prepared to provide an appropriate education. Under these circumstances, I conclude that the appropriate remedy is reimbursement for one full year of tuition at the Landmark School. If the process had not been delayed by the flaws in the state process, a final decision would have been rendered by the Secretary of Education to (sic) later than December 1983 rather than October 1984. Mr. Muth would then have known that his challenge had failed at least at the state level, and he could have reevaluated his decision to place Alexander at Landmark at his own expense. Therefore, because defendants failed to meet the burden of the first question in Rowley, I will order the reimbursement for the 1983-1984 school year.

Eleventh Amendment

By order dated March 18, 1985, I granted in part the motion for summary judgment filed by defendant Robert C. Wilburn, then Secretary of Education, on the grounds that the eleventh amendment barred plaintiff's claim for tuition reimbursement against the Commonwealth. I noted that the claim was really one against the Commonwealth rather than Secretary Wilburn and because it was a claim for retrospective money damages, it was barred under the principles of Edelman v. Young, 415 U.S. 651 (1974).

Since making that ruling, I have had an opportunity to examine some additional cases addressing the eleventh amendment and the EAHCA most notably, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985). Moreover, new counsel has entered the case on

behalf of plaintiff and has raised new and important issues which were not previously addressed, including the very important issue of the procedural flaws which have permeated this case. At the time counsel entered his appearance, prior counsel had stipulated to the dismissal of Secretary Wilburn and the Commonwealth from this action. I was hesitant to permit plaintiff's new counsel to renew the litigation against the state; however, as this case has progressed, I have become convinced that the Secretary and therefore the Commonwealth's presence is necessary to give plaintiff the relief to which he is entitled. After all, it is the Commonwealth which established the system which contravenes federal law. See 22 Pa.Code §13.31 et seq. Therefore, I advised counsel before trial that I would reconsider my ruling

as to the eleventh amendment. To this end, I heard argument from counsel for the Commonwealth and counsel for plaintiff at trial.

The eleventh amendment states that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any Foreign state.

In the absence of state consent to suit or Congressional abrogation of sovereign immunity, a state is immune from a suit brought against it by one of its citizens. Hans v. Louisiana, 134 U.S. 1 (1890). A federal court, therefore, is without jurisdiction over actions of this sort. Eleventh amendment immunity generally extends to a state's agencies or departments.

Pennhurst v. Halderman, 52 U.S.L.W. 4155, 4158 (1984). Similarly, the eleventh amendment bars suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v. Dept. of Treasury, 323 U.S. 459, 464 (1945).

Plaintiff contends that in passing the EAHCA, Congress acted pursuant to its remedial powers under section 5 of the fourteenth amendment and intended to abrogate the state's immunity under the eleventh amendment. In support of this position, plaintiff relies on David D. v. Dartmouth School Comm't., 775 F.2d 411 (1st Cir. 1985), in which the court held that the Act did effectively abrogate the sovereign immunity of the states. In David D., the state had argued that a federal court could not, given the eleventh amendment, enforce

state substantive law against the state as a matter of federal law. Rejecting this contention in the context of the EAHCA, the David D. court held that Congress had acted pursuant to its fourteenth amendment remedial powers to assure equal protection of the law to handicapped children.

It was in Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), that the Court recognized the limitation imposed on the eleventh amendment by the enforcement provisions of §5 of the fourteenth amendment. Holding that the eleventh amendment does not bar a back pay award under Title VII, the Fitzpatrick court emphasized that the eleventh amendment is "necessarily limited by the enforcement provisiors of §5 of the Fourteenth Amendment." "Congress may, in determining what is 'appropriate

legislation' for the purpose of enforcing the provisions of the fourteenth amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Id. Therefore, Congress, when acting pursuant to the fourteenth amendment, may abrogate the states' immunity without the states' consent.

However, the Court, in determining whether Congress has abrogated the states' eleventh amendment immunity, has required "an unequivocal expression of Congressional intent to overturn the constitutionality guaranteed immunity of the several States. (citations omitted)." Atascadero State Hospital v. Scanlon, 105 S.Ct. 3142, 3146 (1985). In Atascadero, the Court held that Congress, in passing the Rehabilitation Act, did not abrogate the eleventh

amendment bar to suit against the states. Before finding hat (sic) federal law overrides the guarantees of the eleventh amendment, courts must be certain of Congress' intent. The Atascadero court found that the Rehabilitation Act provides remedies for violations of §504 by "any recipient of federal assistance." States were not specifically identified, and the Court held that a general authorization for suit is not the unequivocal language necessary to support the abrogation of the eleventh amendment.

Atascadero and the Rehabilitation Act can be distinguished from this case, as shown by David D., (sic) In the preamble to the EAHCA, Congress specifically stated that:

> [I]t is in the national interest that the Federal Government assist the state and local efforts to provide

> programs to meet the needs of handicapped children in order to assure equal protection of the law.

Therefore, unlike in Rehabilitation Act, in the EAHCA, Congress expressly declared that it was acting to assure the equal protection of the law, i.e., that it was acting pursuant to its remedial powers under §5 of the fourteenth amendment. As the David D. court noted, the Supreme Court has already discussed the grounding of the EAHCA in the fourteenth amendment. In Smith v. Robinson, 104 S.Ct. 3457 (1984), the Court held that EAHCA provides the exclusive avenue through which a plaintiff may assert a claim to a free appropriate public education as guaranteed by the equal protection clause.

The conclusion that Congress intended to abrogate the eleventh amendment immunity and subject states to suit in federal court is also supported by the very nature of the Act itself. The Education for All Handicapped Children Act is necessarily aimed at the states and their political subdivisions, as they are the entities principally responsible for providing public education. Under the Act, federal monies will be allocated to a state to assist it in developing and implementing programs for the education of the handicapped. Receipt of this money, however, is conditioned on the state's compliance with the procedural and substantive rights guaranteed by the Act. To qualify for assistance under the Act, a state must demonstrate that the state has in effect a policy that

assures all handicapped children the right to a free appropriate public education. See 20 U.S.C. §1412 et seq. The Act also establishes a detailed set of procedural safeguards through which handicapped children and their parents may enforce their right to a free appropriate public education. Clearly, Congress intended that children and their parents could sue states which failed to provide a free appropriate public education; section 1415(e)(2) specifically provides that "any party aggrieved by the findings and made under subsection (b)... shall have the right to bring a civil action with respect to the complaint pressed pursuant to this section... in a district court of the United States..."

I am convinced that the court's conclusion in David D., is correct.

I am mindful of the decisions cited by defendant Smith which reach a different conclusion, e.g. Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), but I am unpersuaded by the reasoning used therein. Accordingly, I will reverse my prior ruling and hold that plaintiff's claims for tuition reimbursement are not barred by the eleventh amendment.

1986-1987

In his second amended complaint, plaintiff seeks an order requiring defendants Central Bucks, Newman, and Smith to place Alexander at the Landmark School for the 1986-1987 school year. Plaintiff argues that this is the only "appropriate" placement for Alexander.

Because the issue of what is appropriate for the 1986-1987 school year was placed directly in issue by plaintiff and because Alexander has not attended Central Bucks schools since the 1982-1983 school year and therefore Central Bucks had no current I.E.P. for him, I requested the school district to prepare an I.E.P. for the 1986-1987 school year. Central Bucks presented the proposed I.E.P. at trial along with the testimony of Dr. Robert Laws and Bruce Taylor, who were involved in its preparation. In response, plaintiff presented the testimony of Dr. William Adamson and Karl Pulkinnen who both testified that Landmark's program would be appropriate for Alexander.

Under the program proposed by Central Bucks for the 1986-1987 school year, Alexander would spend five class periods per day in special resource

classes - devoted to substantive subjects. Emphasis would be given to Alexander's language based problems and use would be made of the VAKT methodology which has been used at the Landmark School. Use would also be made of computer software packages which are designed to assist learning disabled children. Alexander's progress would be monitored by daily teacher observation as well as pre and post testing. Although no formal tutoring program exists at Central Bucks, there would be substantial one-to-one instruction in the classroom setting. Each classroom will have no more than eleven students at a time and one teacher and one aide will be assigned to each room. Counseling, including psychological counseling will be available for Alexander.

In addition to the usual classroom program, Alexander will have a choice between a half day program at a vo-tech school or a half-day full of electives such as art appreciation and music. After meeting with Alexander, Dr. Atkins concluded that Alexander would benefit from a vocational or technical program because it would take advantage of his exceptional nonverbal abilities and interests. In response, Dr. Adamson expressed the view that Alexander needs a more structured program with more supervision than a regular vo-tech program would offer. However, the program at Landmark, which Dr. Adamson recommends, would offer at most pre-vocational classes, which would not offer Alexander the training which may prepare him for post-school life. Alexander would probably be limited to the vocational program because a college

preparatory math course is a prerequisite for any technical courses, and he will not be ready to complete this math course. Nevertheless, I am convinced that he could benefit from a vocational program. Reference was made to some manual dexterity problems which Alexander allegedly has, but no evidence as to the nature of this problem was introduced. Moreover, I note in his reviews from his arts and crafts courses at the Landmark School, Alexander consistently received comments to the effect that fine motor control was one of his strengths. See C.B. 5, Reports of Christina B. Palmer, November 4, 1983; November 16, 1984.

If Alexander chooses not to enroll in the vo-tech school, he will be able to take several electives with students in the regular education program.

As previously noted, mainstreaming is preferred under the EAHCA. Therefore, to the extent possible a learning disabled child is to be given an opportunity to interact with regular education students. If Alexander were to return to the Landmark School, he would be educated only with students who have handicaps similar to his own.

Dr. Adamson and Karl Pulkinnen both testified that in their respective opinions, Alexander should be returned to the Landmark School for the 1986-1986 (sic) school year. Dr. Adamson stressed the need for a highly structured program while Mr. Pulkinnen emphasized the need for an integrated language based program. Although I have no doubt that the program offered at Landmark is excellent and that it may even be the best program for Alexander, I am mindful that the EAHCA does not require the

state or local educational agency to fund the "best" education. The Act requires only that a handicapped child be provided a free appropriate education, i.e., personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Rowley, 458 U.S. at 203. The program Central Bucks has proposed for Alexander for the 1986-1987 school year would provide him with that appropriate education.

Alexander has not attended the Landmark School since March 1985 so my order will not have the effect of pulling him from that program. I am satisfied that Alexander will benefit academically from the program prepared by Central Bucks, and I am convinced that Alexander will benefit from an opportunity to interact with regular

education students at Central Bucks, perhaps in the vo-tech program. Moreover, placement at Central Bucks would give Alexander an opportunity to further develop a relationship with his father which might not be possible at a residential placement in Massachusetts. Accordingly I will decline to order defendants to place and fund Alexander at Landmark School for the 1986-1987 school year.

Attorney's Fees

Plaintiff in his second amended complaint has included a claim for attorney's fees. The Third Circuit has recently made it clear that attorney's fees are not available under the EAHCA. Wexler v. Westfield Bd. of Education, 784 F.2d 176, 182 n. 3 (1986).

Therefore, because plaintiff's claims arise only under the EAHCA, plaintiff's claim for attorney's fees must fail.

Dr. Thomas Newman, Superintendent of Central Bucks School District

Defendant Newman contends that the defense of good faith immunity should absolve him of any liability. Under Harlow v. Fitzgerald, 457 U.S. 800 (1980), officials are shielded from liability for civil damages insofar as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818.

In this case, the only violation which I have found is the procedural flaws identified in my June 2, 1986 opinion in the administrative procedure as established by the Commonwealth.

Limited to his role as superintendent for the school district charged with providing Alexander with a free appropriate public education, Dr. Newman was bound by the administrative procedures established by the Commonwealth. He had no reason to know that in following the due process procedure set forth in the Pennsylvania Code that he would be violating plaintiff's due process rights. Therefore, Dr. Newman is entitled to receive the benefit of qualified immunity and plaintiff's claim against Dr. Newman should be dismissed.

CONCLUSIONS OF LAW

I make the following conclusions of law:

1. There is subject matter jurisdiction in this court over this action pursuant to the Education for All Handicapped Children Act, 20 U.S.C. §1401 *et seq*.

2. The Individualized Education Program prepared by Central Bucks for the 1983-1984 school year would have afforded Alexander Muth an appropriate education, but the procedural violations which permeated the due process procedure rendered the I.E.P. inappropriate for 1983-1984.

3. Plaintiff is entitled to reimbursement for tuition at the Landmark School for the 1983-1984 school year.

4. Central Bucks has proposed an appropriate program of education for Alexander Muth for the 1986-1987 school year.

5. Central Bucks will be able to implement the proposed program of education for the 1986-1987 school year.

6. The EACHA abrogates the state's eleventh amendment immunity.

7. Plaintiff is not entitled to recover attorney's fees under the provisions of the Education For All Handicapped Children Act.

8. Dr. Newman is immune from liability in this action under the doctrine of qualified immunity.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.		
MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al.	:	No. 84-2032

ORDER

NOW, August 28, 1986, upon consideration of the evidence presented at trial, the arguments made by counsel, and for the reasons set forth in the accompanying findings of fact, discussion and conclusions of law, IT IS ORDERED that:

1. Defendants Central Bucks and Margaret A. Smith, Secretary of Education, shall reimburse plaintiff for

the tuition at the Landmark School for the 1983-1984 school year.

2. Plaintiff's counsel, within ten days of the date of this order, shall submit an affidavit from an official at the Landmark School affirming what the 1983-1984 tuition was at the Landmark School.

3. The I.E.P. prepared by Central Bucks for the 1986-1987 academic year will afford Alexander with a free appropriate public education.

4. Judgment is entered in favor of plaintiff as to his claim for tuition reimbursement for the 1983-1984 school year.

5. Judgment is entered in favor of defendants as to all other claims.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, Secretary of Education of the Commonwealth of Pennsylvania, et al. : No. 84-2032

MEMORANDUM AND ORDER

Huyett, J. February 20, 1987

Plaintiff brought suit under the Education for All Handicapped Children's Act (EHCA), 20 U.S.C. §1401 et seq., against the Central Bucks School District and the Secretary of Education of the Commonwealth of Pennsylvania. The original complaint was filed on April 27, 1984, at which time the

plaintiff was represented by Alexander Hemphill, Esq., of the firm of Monteverde, Hemphill, Maschmeyer & Obert. An amended complaint was filed by Mr. Hemphill on March 21, 1985. On May 30, 1985, the court granted Mr. Hemphill's motion to withdraw as counsel for plaintiff. On June 5, 1985, an appearance was entered by Matthew B. Bogin, Esq., of the Washington firm of Bogin and Eig. On July 8, 1985, a second amended complaint was filed.

On June 2, 1986, I granted summary judgment in favor of the plaintiff on one issue only. I found that Pennsylvania's Administrative Procedure used to determine the appropriate education for handicapped minors did not comply with the dictates of the EHCA. However, I declined to determine the appropriate remedy at that time because "I [did] not believe it [was]

appropriate for me to order tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff's son with an appropriate free education."[1]

At trial, plaintiff sought a declaration that the 1983-84 I.E.P. was inappropriate, reimbursement for tuition at the Landmark School for the 1983-1984 school year and part of the 1984-1985 school year, and an order that the appropriate placement for the 1986-1987 school year was the Landmark School. Plaintiff was not successful in showing at trial that either the 1983-1984 or

---

[1]The "I.E.P." is the individualized education program plan designed by the School District.

the 1986-87 I.E.P. would fail to provide his son with an appropriate education. Therefore, on August 28, 1986 I entered judgment in favor of the defendants on the substantive challenges to the I.E.P. However, I also noted that the delays caused by the flawed hearing process had deprived plaintiff of the opportunity to reconsider decision to place his son in the Landmark School. I concluded that the procedural violations rendered the I.E.P. inappropriate for the 1983-1984, and that plaintiff was entitled to reimbursement for tuition for that year.

As part of my August 28, 1986 judgment, I denied the plaintiff's request for attorneys' fees on the ground that the EHCA did not provide for such an award. However, the EHCA had been amended on August 5, 1986 to

provide for an award of attorneys' fees to a prevailing party.[2] Handicapped Children's Protection Act, P.L. 99-372. §2, 100 Stat. 796 (1986). The amendment applies to all actions which were pending on July 4, 1984 or brought after July 3, 1983. Id., §5. Accordingly, on October 15, 1986 I granted plaintiff's timely motion to alter and amend my judgment to provide for an award of attorneys' fees on the sole issue on which plaintiff prevailed. I ordered plaintiff's former counsel to submit appropriate documentation of their fees, and held a hearing on December 18, 1986. At that hearing, Jean C. Hemphill, Esq., appearing on behalf of Monteverde,

---

[2]The statute expressly bars the court from using any "bonus" or "multiplier" in calculating the fee award.

Hemphill, Maschmeyer & Obert, requested additional time to submit additional substantiation of a claim on behalf of her firm.[3] She was granted an extension to January 22, 1987. The briefing is now complete, and this matter is ripe for decision.

Discussion

The statute provides for an award of attorneys' fees to a "prevailing party." A plaintiff is a prevailing party for attorneys' fees purposes if he succeeds on any significant issue in the litigation which achieves some of the benefit he sought in bringing suit.

---

[3]Plaintiff's former counsel, Mr. Hemphill, is now deceased. His firm therefore required additional time to research his files pertaining to this matter.

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In a case involving "distinctly different claims for relief that are based on different facts and legal theories," plaintiff should be awarded attorney's fees only for counsel's work on the successful claim. Id. at 434-35. Where, however, the claims involve a common core of fact or related legal theories, such that the lawsuit cannot be viewed as a series of discrete claims, the court should forcus on the overall relief obtained by the parties. City of Riverside v. Rivera, ____ U.S. _____, 106 S.Ct., 2686, 2691-92 (1986); Hensley, 461 U.S. 424, 435.

The instant case presents a very unusual situation. On the surface, the two claims in this case are completely distinct. The plaintiff prevailed on a

procedural challenge to the due process hearing afforded him by the state.[4] The relevant facts concerned the details of the hearing process, and were unrelated to the substantive merits of the proposed I.E.P. The defendants' liability on this issue was conclusively determined on June 2, 1986. The plaintiff's substantive claims challenged the merits of the 1983-1984 I.E.P. which was the subject of the due process hearing, as well as the 1986-1987 proposed I.E.P. The legal principles and facts applicable to the substantive claim were

---

[4]The Commonwealth is required by federal law to provide the parent of a handicapped child with an opportunity for an impartial due process hearing to challenge the educational program devised by the school district. 20 U.S.C. §1415.

entirely distinct from those relating to the procedural claim.

There was, however, one important nexus between the two claims: the remedy sought. Plaintiff sought to be reimbursed for the 1983-1984 tuition paid to Landmark School. Whether awarded on the basis of the substantive challenge to the I.E.P. or the procedural challenge to the hearing process, plaintiff could only be reimbursed one time for the 1983-1984 tuition. Had the plaintiff been awarded reimbursement at the time of my June 2, 1986 order, he would have no claim for any of his costs after that date. However, at the time that plaintiff moved for summary judgment, defendants opposed the award of tuition reimbursement, and it was not clear to me that reimbursement would be

appropriate. I therefore deferred my decision on a remedy for the procedural violation until I was able to determine the appropriateness of the proposed I.E.P.'s.

Thus, the plaintiff was required to litigate the merits of the proposed 1983-1984 I.E.P. in order to win tuition reimbursement for that school year. Because the court in June considered the issues to be interrelated, the plaintiff was forced to incur additional attorney's fees. It would be unfair to penalize the plaintiff by applying hindsight to determine that the two issues had no common nexus of fact or law. These additional hours spent litigating the merits of the 1983-1984 I.E.P. were not only reasonable, but were required by the court.

2. Claim of Bogin & Eig.

It is for these reasons that I find that former counsel Matthew Bogin is entitled to an award of reasonable fees for all hours spent by him on the motion for summary judgment[5] and, in addition, to an award of fees for that time spent after June 2 in litigating the merits of the 1983-1984 I.E.P. I emphasize that the basis for awarding the latter fees is not because plaintiff succeeded on the merits of that issue, but because the court had initially determined that an evidentiary record was necessary before the court could determine the appropriate remedy for the procedural violations.

---

[5]Defendants agree that this includes all reasonable fees up to and including June 2, 1986.

Defendants do not challenge the hourly rates claimed by Mr. Bogin ($125)and his associate, Beth Goodman ($75). I find these rates to be reasonable.

Of the time spent by Mr. Bogin and Ms. Goodman up to June 2, the only item challenged by the defendants is Mr. Bogin's travel time to and from Philadelphia. Defendants argue that they should not be penalized because plaintiff chose out-of-state counsel. I have considered this issue, and I find that Mr. Bogin is a specialist in the field of special education law, and that plaintiff was reasonable in seeking counsel outside of Philadelphia. I will therefore allow the claim for travel time.

Of the time spent by Bogin and Eig after June 2, I reject, for the reasons already stated, defendants' blanket

challenge to an award of attorney's fees. However, because counsel is not able to separate the time spent on the 1983-1984 and 1985-1986 I.E.P.'s, counsel asks me to award 50% of the time spent after June 2.[6] I find this amount to be reasonable. I therefore award the firm of Bogin & Eig attorney's fees in the amount of $10,036.87.[7]

---

[6]In the Declaration of Matthew Bogin, I was asked to award fees for 75% of the time spent. However, this request was modified at the hearing held on December 18, 1986.

[7]This total represents: for Matthew Bogin, 25 hours prior to June 2, 1986 and 50.875 hours after that date; for Beth Goodman, 14.55 hours prior to June 2, 1986 and 1.15 hours after that date. I note services rendered on August 5, 1986 by "MJE", billed at $90.00 per hour. This individual is not further identified in the declaration of Matthew Bogin, and I will not award fees for this service.

I will also award plaintiff all costs incurred by Bogin and Eig up to and including June 2, 1986 with the exception of disbursements for "law clerk time." At the hearing on this issue, Mr. Bogin was asked to establish the hourly rate for law clerks and to provide greater detail as to their function. By letter dated February 6, 1987, he has advised the court that this time was billed at $15.00 per hour. This rate shows over 127 hours spent by law clerks on this matter. Mr. Bogin's letter summarizes the duties of the law clerks, who apparently read and summarized transcripts and school records, and did some legal research. However, without further substantiation, I cannot find that plaintiff has met his burden of proof as to these substantial costs. See Hensley, 461 U.S. 424, 433.

I will award plaintiff 50% of the costs incurred after June 2, 1986, for a total of $1071.79.[8]

3. Claim of Monteverde, Hemphill, Maschmeyer & Obert

Ms. Hemphill argues in her memorandum that her firm should also be awarded fees. She argues that the procedural claim on which plaintiff ultimately succeeded was raised in the first amended complaint, filed by Mr. Hemphill on March 21, 1985. See First Amended Complaint, Paragraphs 22-27, 30-33. However, while the first amended complaint did allege facts which were relevant to the procedural claim, the amended complaint as a whole did not

---

[8]This total represents $223.45 in costs prior to June 2, 1986 and $848.34 after that date.

assert a claim for the procedural violation. Although paragraphs 22 and 23 do contain an allegation that the remand of the matter to the hearing officer was in violation of 20 U.S.C. §1415, this matter was never pursued by Mr. Hemphill. This issue was not included in the stipulation of issues for trial signed by Mr. Hemphill. Finally, on November 18, 1985, I granted plaintiff's motion to file a second amended complaint. The motion sought to amend the complaint in order to "raise certain issues not previously raised" concerning "due process violations committed by the Secretary of Education... through his participation in the state level hearing, and the exorbitant amount of time spent on the administrative proceedings, both in direct violation of The Education for All Handicapped Children Act ("EHA")."

At page 6 of my memorandum, I noted that:

> In count two of the second amended complaint, plaintiff contends that the delays in the due process procedure in this case violate his rights under the EHCA, and the due process clause of the fourteenth amendment. Plaintiff has never raised this issue, and to raise this issue at this time will necessitate extensive additional discovery and preparation by all of the defendants. Nevertheless, I will permit plaintiff to add a claim based on the EHCA.

Mr. Hemphill did not raise the procedural claim on which plaintiff prevailed; plaintiff never succeeded on the substantive claims raised in the original and first amended complaints. Therefore, the work done by Mr. Hemphill was not related to the claim on which plaintiff ultimately did succeed. The request of Monteverde, Hemphill, Maschmeyer and Obert for attorney's fees is therefore denied.

4. Liability of the School District

Defendant Central Bucks School District has argued that it should not be liable for attorney's fees because the hearing process in question was one which was established by the Commonwealth and which the School District was required to follow.

Of course, the same argument would apply to the judgment which was entered against both the Commonwealth and the School District. It would be inconsistent for this court to enter judgment against both defendants, and yet award attorney's fees against only the Commonwealth.

The judgment against the School District has been appealed to the Third Circuit. If judgment against either defendant is reversed, it follows that

the award of attorney's fees against that defendant will not stand. However, absent a reversal by the Third Circuit, attorney's fees and costs totalling $11,108.66 are awarded against both defendants.

An appropriate order is attached.

/S/Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

MARGARET A. SMITH, et al. : No. 84-2032

ORDER

HUYETT, J. February 20, 1987

Upon consideration of the declaration of Matthew B. Bogin, the supplementary memorandum of Matthew B. Bogin, the objections of defendants Newman and Central Bucks School District to Affidavit of Matthew Bogin, defendant Smith's response to Matthew Bogin's request, the motion of Monteverde, Hemphill, Maschmeyer & Obert for counsel fees, the memorandum in support of that

motion, the memorandum of defendants Central Bucks School District and Newman contra motion of Monteverde, Hemphill, Maschmeyer and Obert, the supplemental memorandum of Russell A. Muth, Jr., and the letter of Matthew B. Bogin dated February 6, 1987, and for the reasons stated in the attached memorandum, IT IS ORDERED that the following fees and expenses are awarded to be paid by defendants Margaret A. Smith, Central Bucks School District, and Dr. Thomas L. Newman:

To:

Bogin & Eig, Esqs.	
fee, per attached	
memorandum	$10,036.87
expenses	1,071.79
	$11,108.66

No fees or expenses are awarded to Monteverde, Hemphill, Maschmeyer and Obert, Esqs.

IT IS SO ORDERED.

/S/Daniel H. Huyett, 3rd, Judge

Supreme Court, U.S.
FILED
JUL 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

87-7147 (11)

No. 87-1855

RLG. PAGE 21

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

RUSSELL A. MUTH, JR., Respondent,

versus

CENTRAL BUCKS SCHOOL DISTRICT,
DR. NEWMAN, THOMAS L., Superintendent
of the Central Bucks School District and

MARGARET A. SMITH/THOMAS K. GILHOOL, SECRETARY OF EDUCATION,
COMMONWEALTH OF PENNSYLVANIA, Petitioners

REPLY TO
PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

RUSSELL A. MUTH, JR.
66 Springs Drive
Doylestown, Pa. 18901

(215) 348-3014

Respondent
Pro Se

TABLE OF AUTHORITIES:

Cases: Page:

1. Atascado State Hospital v. Scanlon 473 U.S. 234 (1985).....5

2. Board of Education of Hendrick Hudson Central School District Board of Education v. Rowley 458 U.S. 176, 183 (1982).....6

3. Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985)....8

4. Ex Parte Young, 209 U.S. 123 (1908).....6, 7

5. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 [96 S.Ct. 2666, 2671, 49 L.Ed.2nd 614](1976).....5

6. Milliken v. Bradley[Milliken II] - 433 U.S.267, 97 S.Ct. 2749, 53 L.Ed.2nd 745 [1977], on remand 460 F. Supp. 299 [E.D.Mich.1978], remanded 620 F.2nd 1143 [6th Cir. 1980] certiorari denied 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2nd 89 [1980].....7

7. Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D.C. 1972).....6

8. Muth v. Central Bucks School District, 839 F.2d 113 (3rd Cir, 1988).....4

9. Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) 343 F. Supp. 279 (E.D. 1972).....6

10. Smith v. Robinson, U.S. , 104 S.Ct. 3457, 82 L.Ed. 746 (1984).....5, 6, 11

Constitutional Provisions:

United States Constitution --- Amendment XI.....4, 6, 7

United States Constitution --- Amendment XIV

Section One 8

Section Five.....4, 7

Statutes:

1. Education of the Handicapped Act, Public Law 94-142...4, 5, 11

2. Handicapped Children's Protection Act, Public Law 99-372....11

3. Code of Federal Regulations, Title 34, parts 300 to 301.....10

Miscellaneous:

Constitutional Law, Third Edition by John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, West Publishing Co., 1986.....6

Columbia Law Review: The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments (75 Colum L. Rev.).....7

Table of Contents

	Page:
Cover Sheet	1
Questions Presented For Review	2
List of the Parties	3
Reply to Question Number One	4
Reply to Question Number Two	10
Conclusion(s)	11
Table of Authorities	12

QUESTIONS PRESENTED FOR REVIEW BY THE PETITIONER

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and Chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

LIST OF THE PARTIES

PETITIONER:

MARGARET A. SMITH/THOMAS K. GILHOOL, Secretary of Education of the Commonwealth of Pennsylvania

RESPONDENT(S):

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH

MEMORANDUM IN RESPONSE TO REQUEST TO RESPOND TO PETITIONER's WRIT OF CERTIORARI

REPLY TO QUESTION NUMBER ONE

The original plaintiff/current respondent, Russell A. Muth, Jr., has never been trained in the Law and/or taken any courses in a law school; thus, he does not feel he can add anything to what has all ready been said by fully trained members of the legal profession. But a response has been requested and will be executed below.

Counsels for the Commonwealth of Pennsylvania have repeatedly claimed the Secretary of Education and indirectly the Commonwealth of Pennsylvania have absolute immunity from the financial liability brought forth by the decision and order(s) of District Court Justice Daniel H. Huyett, III in Muth versus the Central Bucks School System, et al., because of the Eleventh Amendment of the United States Constitution.

Yet, the Education of All Handicapped Children Act of 1975 was specifically enacted in order to assure equal protection of the law (20 USCS, section 1400 (9), invoking the Fourteenth Amendment rights of the U.S. Constitution ("the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies --- with or without state action --- that interfere with Fourteenth Amendment rights" [383 U.S. at 762, 86 S.Ct at 1160]).

Did Congress effectively overide the states sovereign immunity in enacting the Education For All Handicapped Children Act of 1975 (20 U.S.C. 1400 to 1468)? The applicable principal is clear:

> The Eleventh Amendment is "necessarily limited by the enforcement provisions of section 5 of the Fourteenth

> Amendment," that is, by Congress' power "to enforce by appropriate legislation, the substantive provisions of the Fourteenth Amendment. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 [96 S.Ct. 2666, 2671, 49 L.Ed.2nd 614](1976).

The case which elucidates the most stringent demands upon whether or not the Eleventh Amendment rights are abrogated is Atascadero State Hospital v. Scanlon (473 U.S. ---, 105 S.Ct. 3142, 87 L.Ed.2nd 171 [1985]). The basic requirement of Atascadero is that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself". Unlike Section 504 of the Rehabilitation Act of 1973 (R.H.A.), which was the statute at issue in Atascadero, Congress stated in the preamble of the Education For All Handicapped Children Act of 1975 (E.H.A.) the following:

> It is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

In addition to this unmistakeable statutory language, and again in contrast to R.H.A., the Supreme Court has all ready discussed extensively the E.H.A's grounding on the Equal Protection Clause. In Smith v. Robinson, --- U.S. ---, 104 S.Ct. 3457, 82 L.Ed. 2nd 746, the Supreme Court affirmed the holding that E.H.A. was the exclusive scheme for vindicating handicapped children's rights to "a free appropriate public education as guaranteed by the Equal Protection Clause ... "Id. at 3468. The Court held in Smith:

> In light of the of the comprehensive nature of the procedures and guarentees set out in the EHA and Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommondate the needs of each handicapped child, we find it difficult to believe that Congress meant to leave undisturbed the ability of a handicapped child to go directly into court with an equal protection claim to a free appropriate public education. (Id. at 3469)

In support of this determination, the Supreme Court pointed to the unambiguous statutory language of section 1400 (b)(9) and noted that the impetus behind the E.H.A. was two (2) federal cases establishing that a state's failure to provide to

handicapped children a free public education appropriate to their needs was a Constitutional violation (Smith v. Robinson, 104 S.Ct. at 3468; Rowley, 458 U.S. at 180 n. 2, 192-200, 102 S.Ct. at 3037 n. 2, 3043-3047, and H.R.Rep. No. 94-332 at 3-4, all referring to Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.C. 1972), and Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. 1972). Finally, it is clear that the E.H.A. creates a right, enforceable in federal court, to the free appropriate public education required by the statute (Board of Education v. Rowley, 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2nd. 690] 20 U.S.C., section 1415 (e)(2).

Because the plaintiff/respondent was never trained in The Law, he will use the point of view expressed in the volume Constitutional Law, 3rd edition by John E. Nowak, Ronald D. Rotunda and J. Nelson Young, 1986. In their volume, the authors point out "a private person may bring an equitable action to force a state officer to comply with federal law in the future even though they will be required to spend state funds to so comply" (page 50). The Eleventh Amendment does not grant the states true immunity, for it does not exempt them from the restrictions of federal law. The distinction had its genesis in Ex parte Young, (209 U.S. 123, 28 S.Ct. 441, 52 L.ed. 714 (1908). A Congressional grant of jurisdiction allowing a suit by a citizen against a state indicates that Congress has determined that the federal policy is preeminent. "The use of prospective relief by a federal court will be upheld even if it involves the ordering of the official to use state funds" (Constitutional Law, 3rd edition, page 51). Any case involving the Eleventh Amendment raises an intensely practical problem inherent in the concept of federalism. A state asserting an Eleventh Amendment defense is, in essence, challenging the right of the federal government to impose a monetary burdon on it. But the states have a duty to furnish certain "government" services, for example, education. Did the

Eleventh Amendment gives the states the power to "elect" between their immunity and continued provision of those services? Such a limitation would be, in itself, antithetical to harmonious federalism. "Although the state is the real party of interest, the Eleventh Amendment was never intended, nor held, to grant the states the ability to subvert the supremacy clause by granting immunity to the states or their officials from judicial orders to comply with federal law" (Nowak, The Scope of Congressional Power to Create Causes of Action Against State Governments and the History of the Eleventh and Fourteenth Amendments. 75 Colum.L.Rev. 1413, 1445-56, 1455-58). If the Supremacy Clause of Article V is to have any meaning, federal courts must enforce rights against non-complying states created by these "direct command" provisions. "Similarily, the Supreme Court unanimously held that state officers could be subject to a federal cause of action, and ordered by a federal court, to force them to disburse state funds to institute educational programs in connection with a suit to desegregate public schools (Constitutional Law, 3rd edition, page 51)(Milliken v. Bradley[Milliken II] - 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2nd 745 [1977], on remand 460 F. Supp. 299 [E.D.Mich.1978], remanded 620 F.2nd 1143 [6th Cir. 1980]certiorari denied 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2nd 89 [1980]. Yes, the Supreme Court views the Eleventh Amendment as a bar to federal suits against the state when the suit seeks retroactive relief. One of the amendments underlying purposes was to prohibit the courts from imposing monetary burdons on the states for past actions, reasoning that if the courts could impose liability retroactively, state fiscal policy would be seriously upset; because a state would have to appropriate additional funds to pay for liabilities incurred in prior fiscal years when it was unaware of the need for such an allocation. But the Ex parte Young exception to this principal allows courts to hear suits against state officials if the suit seeks to force them to conform their conduct to federal law; ever since the case of Ex parte Young, federal courts clearly have had the power to

order state officials to comply with federal law in the future. Prospective judicial rulings contain a direct limitation on the degree of hardship imposed upon the states, i.e. the court only determines that certain past practices are not in conformity with the federal law and that the states must comply with that law in the future. Thus, the court imposes no penalty upon the state for their past actions and does not accentuate the clash between the two sovereigns. Therefore, the granting of prospective relief would comport with --- if not further --- harmonious federal relations. Finally, the Fourteenth Amendment establishes federal court jurisdiction to issue prospective relief as is necessary to force the states to conform their laws to the principals of the Fourteenth Amendment (... "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

In Burlington (Burlington School Comm. v. Dept. of Education, --- U.S. ---, 105 S.Ct. 1966 [1985], the Supreme Court addressed the issue on whether or not "the potential relief available under section 1415(e)(2) includes reimbursement to parents for private school tuition and related expenses and whether section 1415(e)(3) bars such reimbursement to parents who reject a proposed I.E.P. and place a child in private school without the consent of local school authorities". The Supreme Court arrived at the following conclusion:

> In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate relief would include a prospective injunction directing the school officials to develop and implement at public expenses an IEP placing the child in a private school.

In this instant case, the hearing officer determined in his report of October 31, 1983 that Robert Alexander Muth was not

receiving a free appropriate public education up through September, 1983: 1.[Findings of Fact:] "The I.E.P. and Notice of Recommended Assignment do not describe an appropriate program for Alexander's learning disabilities" and 2. [Conclusions of Law:] 2. "The program advocated by the school district is appropriate relative to classification but inappropriate relative to effectiveness and efficiency as required by 22 Pa. Code CH-13.11 (a)(b)." Just after the start of the 1983/1984 school year, the parent, Russell A. Muth, Jr., faced with the tortuously slow process of having his son's I.E.P. revised and then implemented, elected to remove his minor child from public school, the Lenape Junior High School of the Central Bucks School District, and placed his son into a private school, the Landmark School, in Prides Crossing, Massachusetts, where he would receive immediately the appropriate educational program the child needed, having arrived at the same basic conclusion developed by the hearing officer, i.e. the program offered by the Central Bucks School District was woefully inadequate/wanting. Since "Delay in resolving matters regarding the educational program of a handicapped child is extremely detrimental to his development" [121 Cong. Rec. 37416 (Nov. 19, 1975 -- remarks of the principal author of Public Law 94-142)], the parent sought to mitigate the damage from the previous inappropriate programs given to his son --- by placing him in a program mandated by the child's physician, William C. Adamson, M.D. (board certified neurologist and psychiatrist --- learning disability specialist).

A legal imbroglio ensued --- lasting for well over a year. The compensation granted to the plaintiff by Judge Huyett was the recovery of the funds the plaintiff expended while the new I.E.P.'s were being developed and for the inordinate amount of time the Commonwealth of Pennsylvania used and abused the legal process, adding substantial delay, i.e. fourteen months to a process that should have taken --- at most --- two and a half

months; in this particular case, federal law (E.H.A.) granted "equity powers" to prevent recapture of the case by the state or local agency so that protracted delay could be avoided. Both the Commonwealth of Pennsylvania and the Central Bucks School District were fully aware of their responsibilities toward the disabled child. The compensation that the Commonwealth of Pennsylvania and the Central Bucks School District are being asked to pay for is prospective (forward) relief for the interval of time when a "free appropriate public education" program was held in abeyance and for the malignantly excessive time used by these governmental entities to create "a free appropriate public education" program for Robert Alexander Muth.

Finally, the legal imbroglio produced several I.E.P.s, which were reviewed by the lower court system(s). Unfortunately not one of those I.E.P.s conforms to the terms and conditions specified in the Code of Regulations, Title 34, parts 300 to 301; nowhere in the previously mentioned I.E.P.s --- is there a schedule showing regular psychological (i.e. psychotherapeutic) counselling specified by the hearing officer (see Writ of Certiorari, number 87-7147 filed by the original plaintiff/respondent).

REPLY TO QUESTION NUMBER TWO

Counsel(s) for the petitioner(s) point out "the Secretary of Education is a high public official appointed by the Governor in accordance with the Constitution of the Commonwealth, ..., whose function is to establish and implement statewide educational policy" (page 48 and 49, Petition for a Writ of Certiorari No 87-1855). Can a political appointee deliver an impartial/objective review of a due process hearing? Secretary Margaret A. Smith/Thomas L. Gilhool came to his or her position as head of the Pennsylvania Department of Education in part to administer and in part to insure the discharge of a political agenda; hence, he or she cannot really function in the impartial role mandated

by Public Law 94-142, section 1415(C).

Conclusion(s)

The most critical question raised by Secretary Gilhool and/or the Commonwealth of Pennsylvania in their Petition for Writ of Certiorari becomes whether the combination of the legislative history and the statement in 20 U.S.C., section (b)(9) and the 1986 amendment to 20 U.S.C., section 1415(e)(4)(g) [Public Law 99-372, 100 Stat. 796] constitute an override of the sovereign immunity granted to the States by the Eleventh Amendment --- by activating the due process rights granted by section five (5) of the Fourteenth Amendment. The respondent feels the Supreme Court has spoken clearly in the past (Smith v. Robinson, ___U.S. ___, 104S.Ct. 3457, 82L.2d 746 [1984]) suggesting no reason exists for the Supreme Court to grant certiorari on this particular issue. Lastly, petitioner(s) Margaret A. Smith/Thomas K. Gilhool are political appointee(s) with a political agenda to discharge; hence, he or she cannot function impartially as required by Public Law 94-142. Thus, Certiorari should be denied in regard to the Secretary of Pennsylvania's role in due process hearings or their review.

Respectfully submitted,

Russell A. Muth, Jr. (Respondent/Original Plaintiff)

(2)

Supreme Court, U.S.
FILED
JUL 25 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1855
NO. 87-7147

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL, PETITIONER
V.
RUSSELL A. MUTH, JR., ET AL,
RESPONDENT
AND
RUSSELL A. MUTH, JR., PETITIONER
V.
THOMAS K. GILHOOL, ET AL.,
RESPONDENT

BRIEF OF RESPONDENTS CENTAL BUCKS SCHOOL DISTRICT AND DR. THOMAS L. NEWMAN IN RESPONSE TO PETITIONS FOR CERTIORARI OF THOMAS K. GILHOOL AND RUSSELL A. MUTH, JR.

Joanne D. Sommer, Esquire
Counsel of Record for
Respondents Central Bucks
School District and Dr.
Thomas L. Newman

Eastburn and Gray
60 East Court Street
Doylestown, PA 18901
(215) 345-7000

10 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....(ii)

SUMMARY OF ARGUMENT..... 1

ARGUMENT..... 2

I. RESPONDENTS CENTRAL BUCKS SCHOOL DISTRICT AND DR. THOMAS L. NEWMAN DO NOT OPPOSE THE PETITION FOR WRIT OF CERTIORARI OF THOMAS K. GILHOOL..... 2

II. THE PETITION OF RUSSELL A. MUTH, JR. SHOULD BE DENIED..... 2

CONCLUSION..... 7

TABLE OF AUTHORITIES

CASES **PAGE**

Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3050, 73 L.Ed. 2d 690 (1982)..... 3,6

Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850, 99 L.Ed. 1231, rehearing denied, 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759 (1955)..... 4

Harlow v. Fitzgerald, 457 U.S. 800 (1982)... 4

Muth v. Central Bucks School District, 839 F.2d 113 (3d Cir. 1988)..... 3

Wexler v. Westfield Bd. of Educ., 784 F.2d 176 (3d Cir. 1986) cert. denied, 107 S.Ct. 99 (1986)..... 5

RULES

U.S. Sup. Ct. Rule 17, 28 U.S.C.A. 5

SUMMARY OF ARGUMENT

Respondents, Central Bucks School District and Dr. Thomas L. Newman have no opposition to the granting of Certiorari on the issues raised in the Petition of Thomas K. Gilhool, No. 87-01855.

The Petition for Writ of Certiorari filed by petitioner Russell A. Muth, Jr. contains issues not properly before this Court because not previously raised by petitioner. Since the issues raised by petitioner-Muth are of a factual or evidentiary nature, this Court's jurisdiction is inappropriate. Petitioner-Muth has made no showing that any of the considerations governing review on certiorari pursuant to Supreme Court Rule 17 is applicable to the within case.

ARGUMENT

I. Respondents Central Bucks School District and Dr. Thomas L. Newman do not oppose the Petition for Writ of Certiorari filed by Thomas K. Gilhool

II. THE PETITION OF RUSSELL A. MUTH, JR. SHOULD BE DENIED

A. PETITIONER-MUTH IS PRECLUDED FROM RAISING CLAIMS NOT PROPERLY PRESERVED AT TRIAL OR ON APPEAL.

Petitioner seeks review by this Honorable Court of twelve "questions". However, with the exception of the issues raised by questions six, nine, ten and eleven, petitioner has failed to properly preserve the remaining issues.[1] At no time during the trial of the case before the District Court did petitioner claim that Pennsylvania imposed a higher substantive standard for the quality of the educational program

---

[1]For purposes of this petition, respondent has concluded that issues six, nine, ten and eleven of the petition relate to the issue of whether the program and placement proposed by respondent for the minor child were appropriate.

than the "appropriateness" standard articulated in Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3050, 73 L.Ed 2d 690 (1982). At the time of trial, petitioner was represented by counsel. On appeal to the Third Circuit, petitioner raised this issue for the first time and the Third Circuit held that the issue had not been properly preserved, Muth v. Central Bucks School District, 839 F.2d 113 at 120 (3d Cir. 1988).[2] On certiorari, this Court may not address the Pennsylvania standard for the quality of the educational program because petitioner failed to properly preserve the issue.

Muth's alleged privacy violations set forth in questions three, four, and five are

---

[2]The Third Circuit stated "In this appeal, Muth raises for the first time the claim that Pennsylvania law goes beyond the federal minimum to set a higher substantive standard for the quality of the program which must be available to handicapped children. Appellant's Brief at 15. Because Muth did not make this argument before the district court, we decline to express an opinion on it", 839 F.2d at 120 FN 13.

not reviewable by this Court because not raised at trial before the District Court. Again, at trial, Muth was represented by counsel and made no objection to the use of evidence of a medical, psychological or psychiatric nature. Any objection was therefore waived by Muth.

Moreover, the allegations propounded in questions seven and eight were never raised before the Third Circuit on appeal and have been waived.

Finally, the issue of Dr. Thomas Newman's liability was specifically found by the Third Circuit to have been waived by Muth's failure to raise the issue on appeal.[3]

Ellis v. Dixon, 349 U.S. 458, 75 S.Ct. 850,

---

[3]The Third Circuit stated, "Dr. Newman, the Superintendent of the Central Bucks School District was initially named by Muth as a defendant as well. However, the suit against Newman was dismissed on the ground that Newman was entitled to immunity under the standard of Harlow v. Fitzgerald, 457 U.S. 800 (1982) (official is immune if did not violate statutory or constitutional rights of which a reasonable person would have known). This dismissal is not challenged on appeal, 839 F.2d at p. 116 FN 2.

99 L.Ed 1231, rehearing denied, 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed 759 (1955).

B. PETITIONER-MUTH'S CLAIMS DO NOT WARRANT REVIEW BY THIS COURT.

Rule 17 of the Supreme Court Rules, 28 U.S.C.A., lists the considerations governing review on certiorari. None of the factors judged important under Rule 17 are present in the petition of Muth. Indeed, the questions presented by Muth, other than those discussed previously, involve questions of fact peculiar to this case only and have no impact on or conflict with any other federal or state court. Review of findings of fact is limited and the factual determinations may be overturned only if there has been clear error, Wexler v. Westfield Bd. of Educ., 784 F.2d 176, 181 (3rd Cir. 1986), cert. denied 107 S. Ct. 99 (1986). This Court has previously delineated the standard under which a program of education must be scrutinized and the Third Circuit's analysis of the educational

program was in accordance with well-settled decisions of this Court, Board of Educ. of Hendrick Hudson Cent. School Dist. v. Rowley, 458 U.S. 176, 102 S.Ct. 3050, 73 L.Ed. 2d 690 (1982).

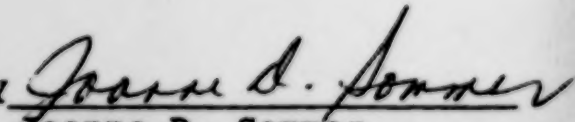
Petitioner-Muth has recited no compelling reasons why this Court should scrutinize the decision of the Third Circuit of Appeals and the petition should be denied.

CONCLUSION

The Petition of Russell A. Muth, Jr. should be denied for failing to properly preserve issues for appeal and for failing to demonstrate significant or important reasons for the exercise of this Court's jurisdiction.

Respectfully submitted,

EASTBURN AND GRAY

BY 

Joanne D. Sommer
Attorneys for Respondents
Central Bucks School
District and Dr. Thomas
L. Newman
60 East Court Street
Doylestown, PA 18901
(215) 345-7000

Supreme Court, U.S.
FILED
JUN 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL, Petitioner,

v.

RUSSELL A. MUTH, JR., et al., Respondents.

BRIEF OF AMICI CURIAE PENNSYLVANIA PROTECTION AND ADVOCACY, INC., AND PENNSYLVANIA ASSOCIATION FOR CHILDREN AND ADULTS WITH LEARNING DISABILITIES, IN OPPOSITION TO PETITION FOR CERTIORARI OF THOMAS K. GILHOOL

Leonard Rieser
Counsel for Amici Curiae
Counsel of Record

Education Law Center, Inc.
2100 Lewis Tower Bldg.
225 S. 15th St.
Philadelphia, PA 19102
(215) 732-6655

2188

TABLE OF CONTENTS

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 3

Argument 5

I. In light of recent amendments to the Education of the Handicapped Act and the Rehabilitation Act, it is premature for the Court to address Petitioner's Eleventh Amendment Question 5

II. The issue of the impartiality of a chief state school officer under the Education of the Handicapped Act is not of widespread importance and does not warrant review for any other reason 15

Conclusion 20

Appendix A 27

TABLE OF AUTHORITIES

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 8, 9

Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176 (1982) 6, 7, 17

Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts, 471 U.S 359 (1985) 7

Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983) 16

David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1790 (1986) 5, 13

Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), aff'd sub nom. Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592 (1988) 5

Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986) 5, 13

Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) 16

Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982) 16

Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592 (1988) 7, 19

Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, 916 (1983) 5

Muth v. Central Bucks School District, 839 F.2d 113 (3d Cir. 1988) 6, 9

PARC v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972) 19

Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980) 16

Smith v. Robinson, 468 U.S. 992 (1984) 12

Victoria L. v. District School Board of Lee County, 741 F.2d 369 (11th Cir. 1984) 16

Welch v. State Department of Highways and Public Transportation, ___ U.S. ___, 107 S.Ct. 2941 (1987) 8

CONSTITUTIONAL PROVISIONS

Eleventh Amendment 2, 3, 6-14 passim

Equal Protection Clause 12

STATUTES AND REGULATIONS

Federal Statutes

Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6012 1

Education of the Handicapped Act, 20 U.S.C. §1400 et seq. — passim

20 U.S.C. §1400(b)(9) — 12
§1412 — 7
§1412-1414 — 6
§1413 — 7
§1414(d) — 7
§1415 — 7
§1415(b)(2) — 18
§1415(e)(4)(G) — 10
§1415(f) — 14

Handicapped Children's Protection Act, Pub. L. 99-372, 100 Stat. 796 (1986) — 9, 10

Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §§10801 et seq. — 1

Rehabilitation Act, §504, 29 U.S.C. §794 — 13, 14

Rehabilitation Act Amendments of 1986, Pub. L. 99-506, §1003(a)(1), 100 Stat. 1845 (1986) — 11

42 U.S.C. §1988 — 11
§2000d-7(a)(1) — 11

Pub. L. 100-259, §4(b)(1), 102 Stat. 29 (1987) — 14

Federal Regulations

34 C.F.R. §104.3(f) — 14
§104.33 — 14

Pennsylvania Statutes

24 P.S. §13-1372(3) — 18
§1373 — 18

71 P.S. §352 18

LEGISLATIVE MATERIALS

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Admin. News 142 18

INTEREST OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] amici file this brief in opposition to the Petition for Certiorari of Thomas K. Gilhool.

Amicus curiae Pennsylvania Protection and Advocacy, Inc., is an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System pursuant to the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §6012, and the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S,C. §§10801 et seq. As such, PP&A is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

children and adults, including many handicapped children who are enrolled in special education programs.

Amicus curiae Pennsylvania Association for Children and Adults with Learning Disabilities, founded in 1967, is an organization of approximately 1300 persons, most of whom are parents of learning disabled children who receive special education services.

Amici have a substantial interest in the broad issues on which Petitioner seeks certiorari, i.e., the applicability of the Eleventh Amendment to claims under the Education of the Handicapped Act and the legal sufficiency of Pennsylvania's system for deciding administrative appeals in special education cases.

SUMMARY OF ARGUMENT

Two recent statutory amendments bear directly upon the issue of the applicability of the Eleventh Amendment to claims under the Education of the Handicapped Act. One of those amendments was considered for the first time at the appellate level by the court below; the other has not yet been considered by the appellate courts. It would be premature for this Court to grant certiorari before the impact of these enactments on the Eleventh Amendment question has been more fully examined by the lower courts.

The second issue on which Petitioner Gilhool seeks certiorari, i.e., whether he can personally decide special education cases, is not of widespread importance. Pennsylvania is one of only a very few states in which such duties are exercised by the chief state school

officer. Moreover, no substantial conflict among the courts of appeals exists on this question.

ARGUMENT

I. IN LIGHT OF RECENT AMENDMENTS TO THE EDUCATION OF THE HANDICAPPED ACT AND THE REHABILITATION ACT, IT IS PREMATURE FOR THE COURT TO ADDRESS PETITIONER'S ELEVENTH AMENDMENT QUESTION

Petitioner asserts that the holding of the lower court on the issue of the Eleventh Amendment conflicts with the decisions of other courts of appeals.2/ However, the cases cited by Petitioner were decided before the enactment of two statutory amendments that bear directly upon the Eleventh Amendment

---

2/ The decision below is in accord with a decision of the First Circuit, David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1790 (1986). The contrary decisions on which Petitioner relies are Gary A. v. New Trier High School District, 796 F.2d 940 (7th Cir. 1986); Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909, 916 (1983) (subsequent history on other issues omitted); and Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), aff'd sub nom. Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592 (1988).

BEST AVAILABLE COPY

question. Because these amendments have not yet been fully considered by the appellate courts, certiorari would be premature.

To appreciate the effect of these enactments, it is useful to review the reasoning of the lower court on the Eleventh Amendment issue. As that court recognized, Muth v. Central Bucks School District, 839 F.2d 113, 129 (3d Cir. 1988), the Education of the Handicapped Act ("the EHA" or "the Act")[3/] imposes upon States the obligation and "primary responsibility" to provide handicapped children with a free, appropriate public education. 20 U.S.C. §§1412-1414; Board of Education of the Hendrick Hudson School District v. Rowley, 458 U.S. 176, 183 (1982). The Act also gives parents the right to an administrative hearing on "complaints with respect to any matter" involving their

---

3/ 20 U.S.C. §1400 et seq.

child's education, and the right to bring a civil action in federal court to obtain review of the hearing decision. 20 U.S.C. §1415.

Because the Act's obligations are imposed in most instances upon States, "complaints" concerning the discharge of those obligations will necessarily run against States.[4/] The administrative hearings made available to parents by the Act will, therefore, frequently involve States as parties.[5/] Further, since

---

4/ The EHA also imposes certain obligations on local school districts, who may therefore also be parties to certain complaints and federal-court litigation. However, the "primary" responsibility rests upon States, Rowley at 183, and the bulk of the Act imposes duties upon States only. See, e.g., 20 U.S.C. §§1412, 1413, 1414(d), 1415.

5/ This Court appears to have assumed that States can be parties to EHA litigation. See Honig v. Doe, ___ U.S. ___, ___, 108 S.Ct. 592, 607 (1988) ("Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue") (emphasis added); Burlington School Committee v. Department of Education of the Commonwealth of Massachusetts, 471 U.S. 359 (1985) (Commonwealth as defendant below, respondent here).

States may be parties at the administrative level, they will also necessarily be parties to federal-court reviews of administrative decisions. Thus, Congress has in the text of the Act "express[ed] . . . in unmistakable language" its intention that States may be sued in the federal courts. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 243 (1985). The Act is in this sense very different from statutes which do not have as their central thrust the imposition of obligations upon States; in such instances, it is often less clear that Congress, merely by enacting a "general authorization for suit," Atascadero at 246, intended to abrogate Eleventh Amendment immunity.6/

6/ For example, the statute considered in Atascadero imposed duties generally upon "recipients" of federal funds but did not mention States. Similarly, in Welch v. State Department of Highways and Public Transportation, ___ U.S. ___, 107 S.Ct. 2941 (1987), the Jones Act generally authorized "[a]ny seaman" to sue his employer in federal court but made no reference to States. In
(footnote continued)

Adopting this analysis, the lower court held that "[t]he text of EHA and its legislative history leave no doubt that Congress intended to abrogate the 11th Amendment immunity of the states." Muth v. Central Bucks School District, 839 F.2d 113, 128 (1988). In reaching this conclusion, moreover, the court examined not only the original text of the Act but also the 1986 amendment, Pub. L. 99-372, 100 Stat. 796 (1986) (the Handicapped Children's Protection Act). The

---

(footnote continued from previous page)
such instances, the question can fairly be raised whether, in enacting a general authorization for suit in federal court, Congress also meant to take the significant step of abrogating the Eleventh Amendment. No such question exists where, as in the EHA, virtually the entire text of the Act concerns the duties of States.

As to Petitioner's assertion that the EHA does not literally mention the Eleventh Amendment, or "state[] that Congress focussed precisely on state liability to private parties," neither Atascadero nor any other decision of this Court requires that the Eleventh Amendment be cited by name or that Congress use any particular form of words. What is required is clarity of Congressional purpose, which is amply present here.

court is the first, and to date the only, appellate court to consider the significance of that amendment.

Section 2 of the amendment, which concerns the award of attorney's fees to prevailing parents in EHA proceedings, states that certain rules relative to the reduction of attorney's fee awards "shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding . . ." Pub. L. 99-372, §2, 100 Stat. 796 (1986), codified at 20 U.S.C. §1415(e)(4)(G) (emphasis added). This language appears to be susceptible of no interpretation other than that States were expected to be parties to the "action[s] or proceeding[s]" brought under the Act.

Petitioner dismisses this point on the ground that it relates to attorney's fees, and that courts had held even before 1986 that

attorney's fees could be awarded under 42 U.S.C. §1988 notwithstanding the Eleventh Amendment. This misses the point. The language of the amendment is cited not for what it says about attorney's fees, but for what it says about Congress' understanding concerning who the parties to the underlying action would be. In our view, and in that of the Third Circuit, Congress believed that States would be parties, because it used the term "State." At the very least, this Court should allow for further consideration by the lower courts of this new language before accepting the matter for review.

Also relevant to the Eleventh Amendment issue is Section 1003(a)(1) of the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, §1003(a)(1), 100 Stat. 1845 (1986), codified at 42 U.S.C. 2000d-7(a)(1). That amendment provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States

> from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance [emphasis added].

The lower courts have not yet considered whether, for purposes of this provision, the EHA is a "statute prohibiting discrimination by recipients of Federal financial assistance." However, an affirmative answer is strongly suggested by the language of the EHA itself, 20 U.S.C. §1400(b)(9),[7] and by the holding of this Court and of several courts of appeals that the Act codifies the Constitutional right of handicapped children to Equal Protection of the laws. Smith v. Robinson,

---

6/ That section provides: "The Congress finds that . . . it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law" (emphasis added).

468 U.S. 992, 1009-13 (1984); David D. v. Dartmouth School Committee, 775 F.2d 411, 421-22 (1st Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 1790 (1986); Gary A. v. New Trier High School District No. 203, 796 F.2d 940, 944 n. 5 (7th Cir. 1986). If the EHA is found to be an anti-discrimination statute for purposes of the Rehabilitation Act amendment, the possibility of Eleventh Amendment immunity in EHA cases is entirely eliminated. This question, like that of the significance of the 1986 amendments to the EHA, should initially be addressed by the lower courts.

Finally, the Rehabilitation Act amendment is significant for another, entirely distinct reason. The amendment expressly abrogates immunity with respect to claims under §504 of the Rehabilitation Act, 29 U.S.C. §794 ("§504"). Regulations under §504 provide, in language virtually identical to that of the EHA, that States must provide handicapped

children with a free, appropriate public education. 34 C.F.R. §§104.33, 104.3(f); and see Pub. L. 100-259, §4(b)(1), 102 Stat. 29 (1987) (applying obligations to States). For this reason, most if not all cases involving the provision of an appropriate education under the Education of the Handicapped Act can equally well be brought -- now without Eleventh Amendment difficulty -- under §504. A holding that EHA claims are barred by the Eleventh Amendment would thus have little if any practical consequence, since parents seeking relief against States in special education matters could obtain identical relief by an alternate route.[8/]

Accordingly, the Court should deny certiorari on Petitioner's Eleventh Amendment question.

8/ 20 U.S.C. §1415(f) authorizes the filing of parallel claims under the EHA and §504.

II. THE ISSUE OF THE IMPARTIALITY OF A CHIEF STATE SCHOOL OFFICER UNDER THE EDUCATION OF THE HANDICAPPED ACT IS NOT OF WIDESPREAD IMPORTANCE AND DOES NOT WARRANT REVIEW FOR ANY OTHER REASON

Petitioner believes that he has the right, under the EHA, personally to decide appeals from administrative hearing decisions. The lower court disagreed, holding that Petitioner must instead appoint hearing officers, not employed by his agency, to perform the review function.

Initially, we note that this is hardly an issue of widespread importance. The United States Department of Education, which oversees the States' implementation of the Act, has responded as follows to our inquiry concerning the number of states in which the chief state school officer serves as reviewing official:9/

> The one other example [in addition to Pennsylvania] that we are aware of is New York, where the Commissioner functions as the due process review officer for EHA-B purposes.

9/ A copy of the response of the Department of Education is attached as Appendix A.

Thus, the situation challenged here evidently exists in only a few states. Moreover, the asserted conflict among the Circuit Courts is of limited significance. The First, Third, Fifth and Eighth Circuits,10/ which have considered the matter in some detail, are in agreement. The conflict results from a decision of the Eleventh Circuit, which in a single paragraph dismissed the issue as "frivolous."11/ This "conflict" is not so substantial or important as to merit this Court's review -- especially since, notwithstanding the Eleventh Circuit's decision, the state at issue in that case has ceased using its Commissioner as reviewer.

10/ Colin K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982); Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981), reh'g denied, 664 F.2d 291 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980).

11/ Victoria L. v. District School Board of Lee County, 741 F.2d 369, 373-74 (11th Cir. 1984).

On the merits, moreover, the issue appears clear. Petitioner administers the department to which the EHA has assigned "primary responsibility" for the education of handicapped children. Board of Education of the Hendrick Hudson School District v. Rowley, supra, 458 U.S. at 183. Parental complaints, therefore, will inevitably be directed against him and his department. It seems obvious that he cannot be an "impartial" decision-maker in such disputes -- just as a judge cannot impartially decide a case to which he or she is a party. In the legislative history of the Act, Congress made precisely this point:

> The hearing will be conducted by an impartial officer since the State or local agency or intermediate unit will be a party to any complaint presented. . . .

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Admin. News 1425, 1502; see also 20 U.S.C. §1415(b)(2) (prohibiting "employee of such

agency or unit involved in the education or care of the child" from serving as impartial hearing officer).

Further, Petitioner exercises pervasive control over local school districts. See, e.g., 71 P.S. §352 (general oversight duties); 24 P.S. §§13-1372(3), 1373 (duty to oversee and approve special classes for handicapped children). He is thus involved in the process of adopting educational priorities; allocating limited financial resources; and generally attempting to ensure the accomplishment of broad statewide objectives. These executive and quasi-legislative roles, while legitimate and essential, are inconsistent with the absolute neutrality required of an impartial decision-maker in individual cases.

The harmful consequences that Petitioner expects to follow from the holding of the lower court are entirely unlikely. In particular, Petitioner will no more be

prevented from "develop[ing] a coherent special education policy" (Petition at 47) than the Secretary of Health and Human Services is prevented, by the existence of administrative law judges who decide individual cases, from making national policy under the Social Security Act.12/

Accordingly, certiorari on the issue of Petitioner's impartiality should be denied.

12/ Petitioner's argument (Petition at 42-43) that Pennsylvania's system results from a consent decree entered in PARC v. Commonwealth of Pennsylvania, 343 F.Supp. 279 (E.D. Pa. 1972), and that Congress was generally guided by PARC in drafting the EHA, is unavailing. As this Court has noted, Congress adopted certain provisions of PARC while rejecting others. Honig v. Doe, supra, ___ U.S. at ___, 108 S.Ct. at 605. Obviously, PARC's provision for review by the chief state school officer was not among those that Congress included in the Act.

CONCLUSION

For these reasons, amici curiae Pennsylvania Protection and Advocacy, Inc., and the Pennsylvania Association for Children and Adults with Learning Disabilities urge that the Petition for Certiorari of Thomas K. Gilhool be denied.

Respectfully submitted,

Leonard Rieser
Counsel for Amici Curiae
Counsel of Record

Education Law Center, Inc.
2100 Lewis Tower Bldg.
225 S. 15th St.
Philadelphia, PA 19102
(215) 732-6655

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF THE ASSISTANT SECRETARY
FOR SPECIAL EDUCATION AND REHABILITATIVE SERVICES

APR -8 1988

Mr. Leonard Rieser
Attorney
Education Law Center, Inc.
2100 Lewis Tower Building
225 South 15th Street
Philadelphia, Pennsylvania 19102

Dear Mr. Rieser:

Thank you for your letter to Jeff Champagne dated March 29, 198 concerning State level review officers under Part B of the Education Handicapped Act (EHA-B).

Your letter asked if we were aware of other States with review officer procedures similar to those in Pennsylvania. The one other example we are aware of is New York, where the Commissione functions as the due process review officer for EHA-B purposes.

I note also that the Third Circuit has ruled in the case of Muth v. Smith and that you participated as counsel for the Pennsylvania Association for Children and Adults with Learning Disabilities. Congratulations on your successful work on the case.

Sincerely,

G. Thomas Bellamy, Ph.D.
Director
Office of Special Education
Programs

RECEIVED
APR 14 1988
EDUCATION LAW CENTER, INC.

APPENDIX A

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX

Maria Parisi Vickers
Chief Deputy Attorney General
206 State Office Building
Philadelphia, PA 19130
(215) 560-2402
Counsel for Petitioner

Martha Field, Esq.
Harvard Law School
Cambridge, MA 02138
(617) 495-2962
Counsel for
Respondent Muth

Joanne Sommer, Esq.
60 East Court Street
Doylestown, PA 18901
(215) 345-7000
Counsel for Respondent
Central Bucks
School District

PETITION FOR CERTIORARI
FILED MAY 6, 1988

CERTIORARI GRANTED OCTOBER 3, 1988

TABLE OF CONTENTS

		PAGE
A.	RELEVENT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN DOCKET NO. 86-1610...	1
B.	RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN DOCKET NO. 84-2032	5
C.	COMPLAINT	10
D.	MEMORANDUM AND ORDER OF MARCH 18, 1985	37
E.	PLAINTIFF'S MOTION TO AMEND COMPLAINT AND MEMORANDUM OF POINTS OF AUTHORITIES, JULY 8, 1985	63
F.	MEMORANDUM, OPINION AND COURT ORDER OF NOVEMBER 18, 1985	71
G.	SECOND AMENDED COMPLAINT, NOVEMBER 29, 1985	88
H.	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW, DECEMBER 18, 1985	102
I.	DEFENDANT SMITH'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, JANUARY 6, 1986	135

PAGE

J. MEMORANDUM, OPINION AND ORDER OF JUNE 2, 1986 [Petition Appendix p. 83a] 156

K. DEFENDANT SECRETARY SMITH'S TRIAL MEMORANDUM, AUGUST 11, 1986 157

L. TRIAL TRANSCRIPT OF AUGUST 11, 1986

(1) p. 6, l. 1 to p. 7, l. 19.. 177

(2) p. 11, l. 24 to p. 17, l. 21 181

(3) p. 23, l. 9 to p. 23, l. 22 192

(4) p. 31, l. 2 to p. 37, l. 9..... 194

(5) p. 40, l. 10 to p. 41, l. 20 204

(6) p. 46, l. 6 to l. 15 207

(7) p. 46, l. 25 to p. 47, l. 2 208

(8) p. 47, l. 17 to p. 48, l. 12 209

(9) p. 56, l-2 210

(10) p. 57, l. 14 to p. 59, l. 8 211

PAGE

(11) p. 61, l. 21 to p. 64, l. 2 214

(12) p. 64, l. 25 to p. 65, l. 23 218

(13) p. 73, l. 2 to p. 75, l. 3 220

(14) p. 80, l. 5 to p. 82, l. 17 224

(15) p. 93, l. 25 to p. 95, l. 16 228

(16) p. 107, l. 24 to p. 108, l. 25 232

(17) p. 113, l. 20 to p. 116, l. 10 234

(18) p. 116, l. 24 to p. 117, l. 7 238

(19) p. 128, l. 22 to p. 129, l. 5 239

(20) p. 130, l. 25 to p. 131, l. 22 240

(21) p. 136, l. 26 to p. 137, l. 25 243

(22) p. 139, l. 11 to p. 140, l. 19 245

PAGE

(23) p. 144, l. 17 to p. 146, l. 7 248

(24) p. 148, l. 2 to p. 155, l. 7 251

(25) p. 171, l. 1 to p. 172, l. 19 264

M. TRIAL TRANSCRIPT OF AUGUST 12, 1986

(1) p. 3, l. 4 to p. 5, l. 17.. 268

(2) p. 8, l. 21 to p. 9, l. 5.. 273

N. TRIAL EXHIBITS

(1) CENTRAL BUCKS SCHOOL DISTRICT I.E.P. FOR FOR ALEXANDER MUTH DATED SEPTEMBER 30, 1980 - SCHOOL DISTRICT EXHIBIT 7 ..... 274a

(2) PSYCHOLOGICAL CONSULTATION FOR ALEXANDER MUTH, MARCH 13, 1981 - SCHOOL DISTRICT EXHIBIT 12 275

(3) CENTRAL BUCKS SCHOOL DISTRICT PSYCHOLOGICAL REPORT, FEBRUARY 25, 1982 - SCHOOL DISTRICT EXHIBIT 14 283

PAGE

(4) CENTRAL BUCKS SCHOOL DISTRICT'S I.E.P. FOR ALEXANDER MUTH, MARCH 16, 1982 - SCHOOL DISTRICT EXHIBIT 9 ..... 288a

(5) EDUCATIONAL EVALUATION BY CENTRAL BUCKS SCHOOL DISTRICT, MARCH 2, 1983 - SCHOOL DISTRICT EXHIBIT 10 289

(6) CENTRAL BUCKS SCHOOL DISTRICT I.E.P. FOR ALEXANDER MUTH, MARCH 11, 1983 AND CENTRAL BUCKS SCHOOL DISTRICT NOTICE OF RECOMMENDED ASSIGNMENT FOR ALEXANDER MUTH, MARCH 11, 1983 - SCHOOL DISTRICT EXHIBITS 1, 2, 4 ..... 293a

(7) MARCH 17, 1983 CENTRAL BUCKS SCHOOL DISTRICT MEMORANDUM SUMMARIZING PROGRAM PLANNING/I.E.P. CONFERENCE OF MARCH 11, 1983 - SCHOOL DISTRICT EXHIBIT 3 294

(8) PSYCHIATRIC EVALUATION OF ALEXANDER MUTH, APRIL 30, 1983; MAY 7, 1983; MAY 14, 1983 - EXHIBIT CB-13 297

PAGE

(9) AUGUST 10, 1983 LETTER FROM ROBERT LAWS, DIRECTOR OF PUPIL SERVICES TO ROBERT MUTH - SCHOOL DISTRICT EXHIBIT 15 329

(10) SEPTEMBER 6, 1983 LETTER FROM MR. MUTH TO ROBERT LAWS - SCHOOL DISTRICT EXHIBIT 17 331

(11) EXCERPTS FROM DUE PROCESS NOTES OF TESTIMONY OF SEPTEMBER 30, 1983 - EXHIBIT CB-1

(1) p. 8, l. 16-20 332

(2) p. 27, l. 25 to p. 28, l. 9 332

(3) p. 29, l. 2-8 333

(4) p. 30, l. 2-5 333

(5) p. 31, l. 21 to p. 32, l. 16 334

(6) p. 35, l. 16 to p. 35, l. 23 335

(7) p. 37, l. 9 to p. 38, l. 17 337

(8) p. 41, l. 16 to p. 41, l. 21 339

PAGE

(9) p. 53, l. 6 339

(10) p. 55, l. 11 to
p. 56, l. 4 340

(11) p. 62, l. 20 to
p. 68, l. 7 341

(12) p. 69, l. 18-22 ... 350

(13) p. 70, l. 17 to p. 75
p. 75, l. 24 350

(14) p. 77, l. 7 to p. 80,
l. 17 359

(15) p. 83, l. 24 to p. 84,
p. 84, l. 20 364

(16) p. 87, l. 19 to p. 88,
p. 88, l. 7 366

(17) p. 100, l. 14-14 ... 367

(18) p. 101, l. 17 to
p. 106, l. 3 368

(19) p. 110, l. 1 to
p. 111, l. 17 375

(20) p. 112, l. 18, to
p. 113, l. 2 378

(21) p. 114, l. 23 to
p. 118, l. 7 378

(22) p. 124, l. 3 to
p. 125, l. 9 384

PAGE

(23) p. 126, l. 25 to
p. 128, l. 1 386

(24) p. 139, l. 13, to
p. 140, l. 23 387

(25) p. 160, l. 11 to
p. 160, l. 16 390

(26) p. 164, l. 3 to
p. 167, l. 7 390

(27) p. 173, l. 4 to
p. 174, l. 7 395

(28) p. 179, l. 14-20 ... 397

(29) p. 181, l. 2 to
p. 183, l. 22 398

(30) p. 186, l. 3 to
p. 187, l. 1 402

(31) p. 187, l. 14 to
p. 187, l. 21 404

(32) p. 192, l. 10-23 ... 404

(33) p. 195, l. 7 to
p. 197, l. 3 405

(12) REPORT OF THE HEARING OFFICER FROM THE DUE PROCESS HEARING HELD ON SEPTEMBER 30, 1983, DECIDED OCTOBER 31, 1983 - PLAINTIFF'S EXHIBIT 1 409

PAGE

(13) OPINION OF THE SECRETARY OF EDUCATION ON MR. MUTH'S AND SCHOOL DISTRICT'S APPEAL FROM THE HEARING OFFICER'S REPORT, JANUARY 23, 1984 - PLAINTIFF'S EXHIBIT 2 428

(14) LETTER FROM CHARLES M. NEILL, SUPERVISOR OF SPECIAL EDUCATION TO MR. MUTH, MAY 1, 1984 - SCHOOL DISTRICT'S EXHIBIT CB-18 438

(15) EXCERPTS FROM DUE PROCESS NOTES OF TESTIMONY OF JUNE 7, 1984 - EXHIBIT CB-2

(1) p. 3, l. 1 to p. 3, l. 9 440

(2) p. 8, l. 7 to p. 9, l. 15 440

(3) p. 35, l. 6, to p. 38, l. 1 443

(4) p. 40, l. 2 to p. 40, l. 18 448

(5) p. 41, l. 16 to p. 42, l. 17 449

(6) p. 50, l. 25 to p. 52, l. 2 451

PAGE

(7) p. 53, l. 16 to p. 55, l. 7 453

(8) p. 58, l. 17 to p. 59, l. 14 456

(16) REPORT OF THE HEARING OFFICER FROM THE DUE PROCESS HEARING HELD ON JUNE 7, 1984, JULY 25, 1984 - PLAINTIFF'S EXHIBIT 3 458

(17) DEPOSITION NOTES OF TESTIMONY OF JUDITH TOLSON, JULY 21, 1986 - EXHIBIT CB-3 465

(18) CENTRAL BUCKS I.E.P. 1986-87 - EXHIBIT CB-9 .... 486a

O. FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER OF AUGUST 28, 1988 [Petition Appendix p. 112a] 487

P. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, JANUARY 29, 1988 [Petition Appendix p. 1a] 488

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MUTH, Jr., RUSSELL A., individually and as next friend of Muth, Robert Alexander :

v. : NO. 86-1610

CENTRAL BUCKS SCHOOL DISTRICT, DR. NEWMAN, THOMAS L., Superintendent of the Central Bucks School District and MARGARET A. SMITH, SECRETARY OF EDUCATION COMMONWEALTH OF PENNSYLVANIA :

Margaret A. Smith, Secretary of Pennsylvania Department of Education

Appellant

(Related Cases 86-1605; 86-1629; 87-1130; 87-1134; 87-1159)

DOCKET ENTRIES

1987

Apr. 3 Motion by Pennsyvania for Retarded Citizens (PARC) and Pennsylvania Association for Children and Adults with Learning Disabilities (PACLD) for Leave to file an amicus

curiae brief within the time fixed for filing of applt's RB, filed (Cv. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (dt)

Apr. 6 — Order (Clerk) granting above motion, filed (Cv. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (dt)

May 5 — Copy of DC order dd. 5/1/87 denying plff's mot. purs. to Fed.R.Civ.P. 60, etc., filed. (Cov. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (sdt)

1988

Feb. 12 — Pet. for Rhng. in banc by Sec. of Education, Commonwealth of Pennsylvania, w/serv. filed (bj).

Feb. 29 — Order (Gibbons, CH. J., Seitz, Weiss, Higginbotham, Sloviter, Becker, Stapleton, Greenberg, Hutchinson, Scirica, Cowen & Van Dusen, C.J.'s) denying the petition for rehearing fld., by Muth and Sec. of Education, fld., (bj), (cvs. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (bj)

Mar. 2 — Motion to Stay Mandate, to and incl. 4-6-88, from Appee (Secy. Edu.) w/serv. fld. (bj) (cvs. 86-1605,

1610, 1629, 87-1130/34/59) (bj)

Mar. 11 Order (Staplenton, C.J.) Granting above motion to & incl. 4-6-88 (Filed. (bj) (cvs. 86-1605, 1610/1629, 87-1130/34/59) (bj)

Mar. 18 Ltr. dated 3-16-88 from J.D. Sommer, Esq., advising Central Bucks School Dist. had no objections to Cmwlth. Pa.'s motion to stay the mandate, and would not be filing an answer, w/serv. Rec'd for the information of the Court. (bj) (cvs. 86-1605/10/29, 87-1130/34/59) (bj)

Apr. 4 Motion for Further Stay of Mandate, by Aplee to and including 5/6/88, w/serv. filed (bj) (cvs. 86-1605/10/29, 87-1130/34/59) (bj)

Apr. 21 Order (Stapleton, C.J.) granting further stay to and incl. May 6, 1988, fld. (bj) (cvs. 86-16-5/10/29, 87-1130/34/59) (bj)

May 10 Ltr. dated 5/9/88 from M.P. Vickers, Esq. advising Cert. was mailed to Sup. Ct. on May 6, 1988 w/serv., rec'd. (bj) (cvs. 86-1605,10,29 & 87-1130/4/&59)

May 23	Cert. copy of Cert. filed on 5/6/88 @S.C.#87-1855, frm Clk of Supreme Court, fld. (bj) (cvs. 86-1605/20/29 & 87-1130/34/59) (bj)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., et al	:	CIVIL ACTION
Plaintiffs	:	
v.		
CENTRAL BUCKS SCHOOL DISTRICT, et al.,	:	
Defendants	:	No. 84-2032

DOCKET ENTRIES

Entry No.	1984	
1	Apr. 27	Complaint filed
	1985	
16	Feb. 8	PLFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF, MEMO, CERT OF SERVICE, FILED.
20	Feb. 27	ORDER THAT THE PLFF MAY FILE AN AMENDED COMPLAINT, FILED. 2-27-85 Entered & copies mailed.
23	Mar. 18	MEMORANDUM & ORDER THAT DEFT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART AND DENIED IN PART. JUDGMENT IS ENTERED FOR DEFT

		AND AGAINST PLFF AS TO PLFF'S CLAIM FOR TUITION REIMBURSEMENT, FILED. 3-18-85 Entered & copies mailed.
24 Mar.	19	MEMORANDUM & ORDER THAT PLFF'S CLAIM FOR TUITION REIMBURSEMENT IS DISMISSED, ETC., FILED. 3-19-85 Entered & copies mailed.
26 Mar.	21	Amended Complaint, filed.
37 July	8	PLFF'S MOTION TO AMEND THE COMPLAINT, CERTIFICATE OF SERVICE, MEMO, FILED. (SECOND AMENDED COMPLAINT ATTACHED).
38 July	10	ORDER THAT PLFF'S CLAIM FOR TUITION REIMBURSEMENT IS REINSTATED, FILED. 7/10/85 ENTERED & COPIES MAILED.
39 July	15	Plff's. Supplemental Memo in Support of Motion to Amend, Certificate of Service, filed.
53 Nov.	19	MEMORANDUM & ORDER THAT PLFF'S MOTION FOR LEAVE TO AMEND IS GRANTED IN PART. PLFF SHALL FILE & SERVE FORTHWITH A SECOND AMENDED COMPLAINT WHICH FULLY COMPLIES WITH THE ACCOMPANYING MEMORANDUM OPINION WITHIN 15 DAYS OF

THE DATE OF THIS ORDER, FILED. 11/19/85 ENTERED & COPIES MAILED.

55 Nov. 29 Second Amended Complaint, filed.

-- " 29 Summons on Second Amended Complaint exit. (mailed to counsel)

58 Dec. 18 PLFF'S MOTION FOR SUMMARY JUDGMENT, MEMO, CERT OF SERVICE, FILED.

1986

59 Jan. 6 Deft. Central Bucks School Dist. & Dr. Thomas Newman's Answer to Motion for Summary Judgment, Memo, Cert. of Service, exhibits, filed.

63 Jan. 30 Deft. Smith's Memorandum of Law in opposition to Plff's Motion for Summary Judgment, cert of service, filed.

64 Jan. 31 Deft. Mgt. A. Smith's Answer to Plff's Second Amended Complaint, cert. of service, filed.

65 June 3 MEMORANDUM & ORDER THAT PLFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART JUDGMENT IS ENTERED IN FAVOR OF PLFF & AGAINST DEFTS AS TO PLFF'S CLAIM THAT THE PENNA. ADMINISTRATIVE

		PROCEDURE CONTRAVENES FEDERAL LAW. CONFERENCE SCHEDULED FOR 6/24/86, 1:30 p.m. CHAMBERS, RM 12614 U.S.CTHS, PHILA. PA., FILED. 6/3/86 entered & copies mailed.
66	Jun 26	ORDER DATED 6/26/86, HUYETT, 3rd, THAT THIS NON-JURY CASE SHALL BE CALLED FOR TRIAL ON 8/11/86 AT 9:30 A.M. IN COURTROOM 12-A, ETC., FILED. 6/27/86: Entered and copies mailed.
68	Jul. 29	Plff's Trial Brief, cert of service, filed.
69	Jul. 29	Plff's Proposed Findings of Fact, Conclusions of Law, filed.
71	Aug. 6	ORDER THAT THIS NON JURY CASE BE CALLED FOR TRIAL 8/11/86, 9:30 AM, CTRM 12-A, COUNSEL FOR COMMONWEALTH TO FILE MEMORANDUM OF LAW ON APPLICABILITY OF 11th AMENDMENT BY NOON 8/7/86, PLFF'S RESPONSE 8/11/86, FILED. 8/6/86 entered & copies mailed.
72	Aug. 11	Deft. Secy Smith's Trial Memorandum, cert of service, filed.

78	Aug. 28	FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER, FILED. 8/28/86 entered & copies mailed.
79	Aug. 28	ORDER THAT JUDGMENT IS ENTERED IN FAVOR OF PLFF AS TO HIS CLAIM FOR TUITION REIMBURSEMENT FOR THE 1983-1984 YEAR, JUDGMENT IS ENTERED IN FAVOR OF DEFTS & AGAINST PLFFS AS TO ALL OTHER CLAIMS. 8/28/86 entered & copies mailed.
87	Sept. 29	Deft. Mgt. Smith Secy of Pa. Dept. of Ed.'s Notice of Appeal, filed. 9/30/86 copies to R.Muth, J.Sommer, Esq., M.Vickers, J.Huyett, D.Spitz, Clerk, USCA
88	Sept. 29	Copy of Clerk's Notice, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 84-2032
ROBERT C. WILBURN, Secretary of Education of the Commonwealth of Pennsylvania and CENTRAL BUCKS SCHOOL DISTRICT and DR. THOMAS L. NEWMAN SUPERINTENDENT of the Central Bucks School District,	:	COMPLAINT
Defendants	:	

I. PRELIMINARY STATEMENT

1. This is a civil action seeking declaratory and injunctive relief and compensatory damages for the plaintiffs against the Pennsylvania Secretary of

Education, the Central Bucks School District, and their officials, on the basis that the defendants School District, through their officials, are failing and refusing to provide and the Secretary is failing to order an appropriate educational placement/program for the minor plaintiff, a gifted handicapped child. These actions and refusals to act are in violation of federal and state law and the equal protection and due process clauses of the United States Constitution.

II. JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 20 U.S.C. §1415(e)(2) of the Education for All Handicapped Children Act of 1975,

20 U.S.C. §1401 et seq., in that this action is brought by plaintiffs aggrieved by a final decision of the defendant Secretary of Education regarding a complaint presented pursuant to 20 U.S.C. §1415(c); pursuant to 28 U.S.C. §§1343(3) and (4) in that this is an action brought pursuant to 42 U.S.C. §1983 to redress the deprivation under color of state law of rights, privileges and immunities secured to the plaintiffs under the U.S. Constitution and acts of Congress providing for the equal rights of citizens, including the Rehabilitation Act of 1973, 29 U.S.C. §794; pursuant to 28 U.S.C. §1331, in that the amount in controversy as to each of the named plaintiffs, exclusive of interest and costs, exceeds the value of $10,000 and this action arises under the Fourteenth

Amendment to the U.S. Constitution and the laws of the United States. Additionally, declaratory relief is sought pursuant to 29 U.S.C. §§2201 and 2202, and this court is asked to exercise its pendent jurisdiction over plaintiffs' state claims against the school district defendants, in that the state and federal claims arise from a common nucleus of facts, and should be tried in a single judicial proceeding.

3. The plaintiffs have no adequate remedy at law and have suffered, and unless the defendants and their agents, representatives and employees are permanently restrained, will continue to suffer immediate and irreparable harm from the course of conduct of which they complain herein.

III. PARTIES

4. The named plaintiffs are as follows:

(a) Robert Alexander Muth (hereinafter "Alexander") is a learning disabled student of gifted intelligence who brings this suit by his parent and next friend, Russell A. Muth, Jr. Alexander resides with his father at 66 Springs Drive, Doylestown, Pennsylvania, 18901. He is a resident of the Central Bucks School District.

(b) Russell A. Muth, Jr., is the parent of Robert Alexander Muth. They reside at 66 Springs Drive, Doylestown, Pennsylvania 18901.

5. The defendants are as follows:

(a) Robert C. Wilburn, Secretary of Education of Commonwealth of Pennsylvania, and as its chief executive

officer is responsible for the administration and operation of the Pennsylvania Department of Education (hereinafter "Department"), including the Department's "Bureau of Special and Compensatory Education." As the state educational agency, the Department is responsible for insuring that all requirements of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq. (hereinafter "P.L. 94-142") are carried out by each school district in Pennsylvania, defendant's School District. Defendant Robert C. Wilburn whose business address is Pennsylvania department of Education, Box 911, Harrisburg, Pennsylvania 17126, is sued in his official capacity. (Hereinafter defendant Robert C. Wilburn is referred to as "the Secretary".)

(b) The Central Bucks School District (hereinafter "School District"), is a governmental unit which contains and administers the public schools in Doylestown, Pennsylvania 18901. The administrative offices of the School District are located at 315 West State Street, Doylestown, Pennsylvania 18901.

(c) Dr. Thomas L. Newman is Superintendent of the School District and, as such, is responsible for the day-to-day supervision of the public schools in the School District; he is also responsible for assuring that the School District's special education programs are operated in accordance with applicable federal and state law. Defendant Dr. Thomas L. Newman, whose business address is 315 West State Street, Doylestown, Pennsylvania 18901,

is sued in his official capacity.

IV. FACTUAL ALLEGATIONS

6. Under federal and state law, local school districts in Pennsylvania must provide each handicapped student with a free appropriate public education, that is a program of instruction and related services specially designed to meet each handicapped child's individual/unique educational needs without cost to the child's parents.

7. The Pennsylvania Department of Education, as the state educational agency, is responsible for insuring that this mandate is carried out with respect to each handicapped student in the Commonwealth.

8. Whenever possible, free appropriate public education is to be provided in public programs operated by school districts and Intermediate Units. However, when the available public programs are not adequate, private sector resources must be sued and must be publicly funded.

9. State and federal law further require that all handicapped children and their parents or guardians be given access to due process procedures by which they may challenge, inter alia, all decisions regarding their educational placements. These procedures include a due process hearing before an impartial hearing officer, an appeal from the decision of the hearing officer to the Secretary, and an appeal from a final decision of the Secretary to federal or state court. 20 U.S.C.

§1415; 34 C.F.R. §§300.506-511; 22 Pa. Code §§13.32, 13.33.

10. The Department and the defendant School District are recipients of federal financial assistance, including assistance pursuant to P.L. 94-142.

11. The minor plaintiff, Robert Alexander Muth, is a gifted learning disabled student experiencing severe learning disabilities with secondary emotional problems.

12. Robert Alexander Muth entered the Central Bucks School System in September of 1980 at the Paul W. Kutz Elementary School. He was placed in the Kutz's School Resource Room with part-time mainstreaming in Art and Music. Alexander demonstrated no significant habilitation or remediation of his learning disability during the 1980 to 1981 school year. A pattern of

teacher harassment developed. In September of 1981, Alexander was placed in a newly opened second resource room at the Kutz School, partly to terminate the poor teacher to student interaction and partly to give the student one-to-one teaching with a learning disabilities teacher, Margaret Tilghman. Only minimum progress was shown during the 1981 to 1982 School year. In September of 1982, Alexander was transferred from the Paul W. Kutz Elementary School to the Lenape Junior High School and the gaps between his expected levels of performance/competence (mastery of the 7th grade level of education) and his actual level of performance (as measured by the district's own standarized tests) were as follows: In mathematics Exlander scored with a 5.9 total grade

score, behind 1.1 years. In spelling Alexander scored with a 3.3 total grade score level, behind 3.7 years. In reading Alexander scored at the 3.6 grade level, behind 3.4 years.

13. When Alexander Muth entered the Central Bucks School System, the gap between his expected level of performance (4th grade competency) and his actual level of performance as shown by tests results submitted to the Central Bucks School by Dr. Thomas E. Atkins of Children's Hospital of Philadelphia was two (2) years. By June of 1983, Robert Alexander Muth's demonstrated level of competence was between three (3) to four (4) years below grade level, demonstrating a marked deterioration in his academic training, a glaring deficit when

Alexander's gifted intelligence is taken into consideration.

14. As a result of his inappropriate educational programing Alexander has displayed significant emotional distress which has conspicuously interferred with the learning, habilitation, and remediation process and the development of secondary emotional decompensation, i.e. characterized by the appearance of excessive anxiety or depression resulting in partial academic disablement and much suffering.

15. After these years of failure, in , (sic) Mr. Russell A. Muth, Jr., Alexander's parent, requested that for school year 1983-84 the defendant School district and its officials place Alexander in a private school with the supportive services necessary to meet

his individual needs, and publicly fund that program.

16. School District refused to place Alexander into an appropriate private school.

17. Alexander's father requested a due process hearing in accordance with legally required due process procedures. In addition, Alexander was placed in the Landmark School on the advice Dr. William Adamson, who felt that an additional year in the Lenape Junior High School of the Central Bucks School system would be very detrimental to his mental health.

18. Alexander was placed at the Beverly Farms Campus at Landmark in a program for dyslexic students with expressive language deficits like Alexander's i.e., a program crafted for dyslexis children with "subtle

dysphasia". The initial expense for enrollment of Alexander into this program has been born primarily by his father; his father's resources are virtually at an end.

19. Alexander Muth has made dramatic education programs. Recent tests indicate he has grown/demonsotrates 1.7 years of growth in spelling, 1.2 years in reading and 2.2 years in mathematics. Overall he has shown 1 and 3/4 years of growth and has begun closing the gap between his expected level of competence and his actual level of performance which heretofore had only spread apart wider. Alexander has achieved the ability to leave his emotional stress at the classroom door and does not let his emotional overlay interfer with his academic program.

20. Should Alexander be forced to leave Landmark School, his dynamic academic progress will retrogress and he will lose the very skills he has begun to acquire, his emotional overlay will re-appear, and his physical and emotional well-being will be endangered.

21. In September 30, 1983, a due process hearing was held before Venard Trent hearing officer appointed by the Department of Education regarding, inter alia, Alexander's right to an appropriate special education. On October 30, 1983, a decision was issued by the hearing officer. In that decision the hearing officer found an extremely intelligent severely learning disabled youngster who had not received an appropriate education program from his school and who required an

appropriate special education in a more restrictive educational setting than the district could offer. The hearing officer held inter alia:

A. Alexander was of average to mentally gifted intelligence and should be provided appropriate special education in a more restrictive educational setting.

B. That Alexander had not made appreciable gains in reading and that his socio-emotional difficulties had been exacerbated by the current educational placement;

C. That changes in the public program available to Alex had not alleviated the emotional distress or facilitated the acquisition of necessary academic, social and vocational skills;

D. That Alex has a significant auditory perceptual dysfunction which

had not been remediated throughout his educational program;

E. That, when developing a program for Alex, his potential to function within the mentally gifted range must be considered, and he must be provided special activities and services not ordinarily provided in a regular program.

22. School District disputed vigorously the findings and recommendations of the hearing officer and persisted in its old view unwilling to admit and accept the ruling of the Hearing Officer and appealed to Secretary of Education. Alex and his father cross-appealed on the grounds that, while finding in their favor on every factual issue, the Hearing Officer had failed to order a placement in a

private school similar to the Landmark School.

23. The Secretary of Education, in violation of his duty to issue a final order within 45 days of the receipt of an appeal, instead ordered the matter reconsidered by the very district personnel who continue to misunderstand and misdiagnose the needs of the student.

24. Parent has met burden of showing the school district cannot provide Alex with the free appropriate public education to which he is by law entitled, and at this point in his educational career, such a program can only be provided in a private school setting such as the Landmark School.

CAUSE OF ACTION I.

25. Plaintiffs incorporate herein by reference paragraphs 1 through 24 above.

26. P.L. 94-142 provides that all public agencies such as the defendants School District and the Department must insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their individual needs. 20 U.S.C. §§1412(5)(B) and 1414(a)(C)(iv); 45 C.F.R. §§121a.1, 121a500-556.

27. The minor plaintiff, Robert Alexander Muth, is a handicapped child under definition set out in P.L. 94-142. 20 U.S.C. §1401(a); 45 C.F.R. §121a.5.

28. As the state educational agency, the Department of Education is responsible for insuring that all requirements of P.L. 94-142 are carried out by each school district and intermediate unit in the Commonwealth State of Pennsylvania, including the defendants School District and Intermediate Unit. 20 U.S.C. §1412(6), 45 C.F.R. §121a. 600(a). Defendant Wilburn is the Chief Executive Officer of the Department.

29. The failure and refusal of the local defendants to place, and of the defendant Secretary to order the placement of Robert Alexander Muth in an appropriate education setting violates plaintiff's rights under the above-cited sections of P.L. 94-142.

CAUSE OF ACTION II.

30. Plaintiffs incorporates herein by reference paragraphs 1 through 29 above.

31. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "no otherwise handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

32. Federal regulations promulgated pursuant to the above statute, 34 C.F.R. §§300.31 et seq., require, inter alia, that all recipients of federal financial assistance shall provide a free appropriate education to each qualified

handicapped person who is a legal resident of the recipient's jurisdiction, regardless of the nature or severity of such person's handicap. 45 C.F.R. §§84.31-84.39.

33. The minor plaintiff is a qualified handicapped person within the definitions set out in §504 of the Rehabilitation Act of 1973 and its implementing regulations, and the Department and defendants School District are recipients of federal financial assistance.

34. The failure and refusal of the local defendants to provide, and of the defendant Secretary to order placement of Robert Alexander in a private school placement where he may be given appropriate educational program equal to his non-handicapped peers violates minor plaintiff's rights under §504 of the

Rehabilitation Act of 1973 and the above-cited implementing regulations.

CAUSE OF ACTION III.

35. Plaintiff incorporates herein by reference paragraphs 1 through 34 above.

36. The above-described actions and failures to act of defendants deny to the minor plaintiff his rights to receive an equal education with others in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

CAUSE OF ACTION IV
Pendent State Claim

37. Plaintiffs incorporates herein

by reference paragraphs 1 through 36 above.

38. Pennsylvania statutes and regulations mandate that an appropriate program of education and related services be provided for each school-aged handicapped child. 24 P.S. §13-1371 et seq., 22 Pa.Code Chapters 13 and 341.

39. The above-described failures and refusals to act by the defendant's School District and its officials deny to the minor plaintiff herein his right to a free appropriate program of education and training.

WHEREFORE, the plaintiff pray for the following relief:

1. That this court take jurisdiction of this matter.

2. That this court grant declaratory relief, pursuant to

28 U.S.C. §§2201 and 2202, declaring that the defendants are in violation of the above-cited statutory and constitutional provisions as set forth herein, and that this court take jurisdiction of plaintiffs' pendent state claim.

3. That this court order the defendant School District and defendant Department of Education to fund the education of Alex at the Landmark School or similar educational institution;

4. That this court order defendant school district and defendant Department of Education to pay plaintiffs damages in the amount of the tuition paid by them to Landmark School which was as of the filing of this complaint is $10,825.00.

5. That this court should order

such other relief as it deems necessary and proper.

6. That this court should order the payment of reasonable attorney's fees and costs to plaintiffs.

/S/ Alexander Hemphill
Attorney for Plaintiff

OF COUNSEL:

MONTEVERDE, HEMPHILL, MASCHMEYER & OBERT
1610 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v. :

ROBERT C. WILBURN, et al : No. 84-2032

MEMORANDUM AND ORDER

HUYETT, J. March 18, 1985

Plaintiff Russell A. Muth, Jr., individually and on behalf of his minor child, Robert Alexander Muth, brough this action seeking declaratory and injunctive relief and compensatory damages in the amount of $10,825.00 against defendant Robert C. Wilburn, Secretary of Education, Central Bucks School District and Dr. Thomas L. Newman, Superintendent of the Central

Bucks School District. Mr. Muth seeks relief based on defendants' alleged failure to order an appropriate educational placement program for the minor plaintiff, a gifted handicapped child.

Presently before me is defendant Wilburn's motion for summary judgment based on the following issues: jurisdiction over the defendant is barred by the eleventh amendment to the United States Constitution; plaintiff cannot recover the cost of his son's out-of-state private school tuition under the Education For For All Handicapped Children Act, the procedures of the Education for All Handicapped Children Act precludes relief under § 1983 of the Civil Rights Act, and § 504 of the Rehabilitation Act may not be utilized to circumvent the procedures

and remedies of the Education For All Handicapped Children Act. After defendant filed his motion for summary judgment, plaintiff, with my leave, filed an amended complaint. In his amended complaint, plaintiff dropped his claims pursuant to section 504 of the Rehabilitation Act and section 1983. Therefore, I will only consider defendant's first two arguments.

FACTS

Robert Alexander Muth enrolled as a student in the Central Bucks School District in 1980. Prior to his enrollment, he was, at the request of his family physician, Dr. Tucker, and his father, evaluated by a clinical psychologist. Alexander was diagnosed as a learning disabled child under

22 Pa.Code §§ 341.1, 13.1, and was placed in a special education program for learning disabled students. An Individualized Educational Program ("I.E.P.") for Alexander was developed, as required by the School Code, and implemented.

On March 11, 1983, Mr. Muth received a notice of recommended assignment and an I.E.P. plan which recommended additional mainstreaming for his son. Prior to the implementation of the March 1983 program changes, an educational evaluation, a psychological evaluation and an auditory analysis were conducted by a Multidisciplinary Team. Meetings were held between Alexander's father and the members of the Multidisciplinary Team in which it was agreed that the new I.E.P. program would be instituted on a

diagnostic basis with close monitoring of Alexander's progress.

In June of 1983, a meeting was held between district personnel and Mr. Muth to evaluate Alexander's progress and to develop a proposal for the upcoming 1983-1984 school year. At that time, it was recommended that Alexander's mainstreaming be discontinued and that he be placed in a self-contained learning disabilities classroom, a more restrictive learning environment.

On June 20, 1983, the Central Bucks School District received a request for a due process hearing from Mr. Muth. Plaintiff asked the District not to make any changes in Alexander's March 1983 I.E.P. In September, Alexander was removed from the Central Bucks School District and was enrolled at the Landmark School in Massachusetts, a

private school, by his father. At this time, Mr. Muth also asked the Central Bucks School District to develop a new I.E.P. for Alexander.

On September 30, 1983, a due process hearing was held before Hearing Officer Bernard Trent. At the hearing, the School District presented the March 11, 1983 I.E.P. along with the June 17, 1983 recommended changes for the 1983-1984 school year. Mr. Muth presented a psychiatric report. On October 31, 1983, Mr. Trent issued his decision in which he concluded that Alexander was an extremely intelligent but severely learning disabled child who had not received an appropriate special education and he held that when developing a program for Alexander the School District had to consider the potential to function within the gifted

range and provide him with special activities and services not ordinarily provided in a regular program.

Both the School District and plaintiff appealed the Hearing Officer's decision to the Secretary of Education of the Commonwealth of Pennsylvania pursuant to 22 Pa. Code § 13.32(24) and 34 C.F.R. § 300.510(a). Plaintiff appealed on the grounds that although the Hearing Officer had found in their favor on every factual issue, he has not ordered placement in a private school similar to the Landmark School as plaintiffs had requested. The Secretary of Education remanded the case on January 23, 1984 to the Hearing Officer with instructions to the District to present additional information in the form of a revised I.E.P. reflecting the June 17, 1983 recommendations.

Mr. Muth was invited to participate in the I.E.P. conference and a meeting was scheduled for March 28, 1984. At the March meeting, Alexander's I.E.P. was revised to encompass the June 1983 recommendations although Mr. Muth was unable to attend. On April 27, 1984, the Multidisciplinary Team reconvened the I.E.P. meeting at which time Mr. Muth was in attendance. Mr. Muth's concerns were addressed in a further revised I.E.P., but plaintiff did not agree to the Recommended Assignment and a hearing was held before Mr. Trent on June 7, 1984. In the meantime, plaintiff initiated the present suit.

Mr. Trent issued his decision on July 25, 1984, in which he stated that modifications and adjustments which the Central Bucks County District made to the March 28, 1984 I.E.P. constituted an

appropriate program of special education for Alexander. On appeal, the Secretary adopted the Hearing Officer's conclusions and dismissed plaintiff's exceptions. Plaintiff now appeals from this order.

ELEVENTH AMENDMENT

In his motion for summary judgment, defendant Robert Wilburn asserts that jurisdiction over him is barred by the eleventh amendment of the United States Constitution. The eleventh amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

In the absence of consent to sue or a Congressional abrogation of its sovereign immunity, a state is immune from suit brought by one of its citizens. Hans v. Louisiana, 134 U.S. 1 (1980) and therefore a federal court is without jurisdiction over the action. The eleventh amendment immunity generally extends to a state's agencies or departments. Pennhurst v. Halderman, 52 U.S.L.W. 4155, 4158 (1984). Similarly, the eleventh amendment bars a suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

In Ex Parte Young, 209 U.S. 123 (1908), the Court established an important exception to the general sovereign immunity rule. Enjoining the Attorney General of the State of

Minnesota from bringing suit to enforce a state statute that allegedly violated the fourteenth amendment, the Court held that an official who acts unconstitutionally is stripped of his immunity because the state could not authorize his unconstitutional action. Similarly, in Edelman v. Jordan, 415 U.S. 651 (1974), the Court held that when an official has violated federal law, the federal court may award an injunction that governs the official's future conduct but not one that awards retroactive monetary relief.

Plaintiff, in filing this action, seeks several forms of relief including a declaratory judgment that the defendants are in violation of the Education For All Handicapped Children Act, section 504 of the Rehabilitation Act, and various provisions of the

United States Constitution, an injunction whereby defendants will be ordered to fund the education of Alexander at a private school similar to the Landmark School and an award of damages in the amount of the tuition paid by plaintiff to Landmark School since Alexander was removed from the Central Bucks School District. Defendant Wilburn asserts that jurisdiction over him is barred by the eleventh amendment of the United States Constitution and concludes the section of his memorandum of law pertaining to the eleventh amendment by asserting that the plaintiff's claims for retroactive monetary relief from the Commonwealth is barred by the eleventh amendment. To the extent that defendant Wilburn's position is based on the latter statement, I accept it, but I cannot

conclude that plaintiff's entire action against defendant Wilburn is barred by the eleventh amendment.

Plaintiff's claim for damages in the amount of the tuition paid to the Landmark School is essentially a claim against the state.[1] The amount would almost certainly be paid out of the state treasury and not out of the pockets of Mr. Wilburn, a state official. Retroactive monetary relief of this type is clearly barred by the

---

[1]In his amended complaint, plaintiff substituted the name of Margaret A. Smith, the new Secretary of Education, for that of Robert Wilburn. This step emphasizes the point that Mr. Wilburn was sued in his official capacity and any judgment against him in the form of damages would really be a judgment against the Commonwealth.

eleventh amendment. Pennhurst, 52 U.S.L.W. at 4158, Edelman, 415 U.S. at 668.

> When the action is one for recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.

Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). Therefore, plaintiff's claim for tuition reimbursement must be dismissed as barred by the eleventh amendment.

It is not clear from his motion whether defendant Wilburn is also contending that the remainder of plaintiff's claims are barred by the eleventh amendment. Assuming that this is his position, it must nevertheless be rejected. Plaintiff seeks an injunction

ordering defendants Wilburn and Central Bucks School District to fund the education of Alexander at a private school like the Landmark School Although such an order would entail the expenditure of state monies, the claim is not necessarily barred by the eleventh amendment. In Edelman v. Jordan, 415 U.S. 651, 667-68 (1973), the Court noted that fiscal consequences to a state's treasury are often the necessary result of compliance in the future with a substantive federal question determination. What is necessary is an allegation that the state official has violated either a constitutional provision or federal law. Cory v. White, 457 U.S. 85, 91 (1981); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937).

In this case, plaintiff has alleged that defendant has violated the Educational For All Handicapped Children Act. The fact that an adjudication in plaintiff's favor may necessitate expenditure by the state in the form of tuition does not bar this action from proceeding under the eleventh amendment. An injunction requiring the payment of tuition would only be imposed if it is concluded that defendant Wilburn, a state official, violated federal law. See Graham v. Richardson, 403 U.S. 365 (1971) (Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens.)

Plaintiff also seeks a declaratory judgment that defendant Wilburn has violated the Education For All

Handicapped Children Act. A judgment by this court that defendant Wilburn has or has not violated federal law will not run afoul of the eleventh amendment. As the Court noted in Pennhurst, 52 U.S.L.W. at 4159, the doctrine first set forth in Ex Parte Young, 209 U.S. 123 (1908) is necessary to permit the federal courts "to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" The supreme authority of the United States is encompassed in both the United States Constitution and the federal law passed by Congress.

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The Education ForAll Handicapped Children Act (EAHCA) requires states to

(1) establish procedures for consultation for individuals involved in the education of handicapped children, 20 U.S.C. § 1412(7); (2) submit plans outlining their policies and procedures for compliance with the Act, 20 U.S.C. § 1412(4) and (7); (3) improve procedures for the evaluation and placement of handicapped children, 20 U.S.C. § 1412(5); and (4) establish procedural safeguards for parents or guardians to challenge the administrative determination of the evaluation and educational placement of their handicapped children, 20 U.S.C. § 1415. It is this last provision that is the focus of the present case. Plaintiff contests the administrative determination that Alexander's needs can adequately be met in the public school system. Moreover, while they were in

the midst of the administrative process, plaintiff decided unilaterally to withdraw Alexander from the public school and enroll him at the private Landmark School. Plaintiff now seeks reimbursement from defendant Wilburn as well as the School District for the tuition expenses incurred. Defendant asserts that plaintiff is not entitled to this reimbursement under the EAHCA.

Section 300.513 of title 34 of the Code of Federal Regulations states:

> During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

In this case, there was no agreement between the school or the Department of

Education and Mr. Muth to remove Alexander from the public school and place him in the Landmark School, Mr. Muth acted unilaterally and therefore in violation of the regulations governing the EAHCA. In Stemple v. Board of Ed. of Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), the court held that parents may not elect unilaterally to place their child in private school and then seek to recover the tuition costs incurred. As the court in Zvi D. by Shirley D. v. Ambach, 694 F.2d 904 (2d Cir. 1982) noted when ruling that a parent was not entitled to reimbursement, 34 C.F.R. § 300.513 (1981) is, in effect, an automatic preliminary injunction and therefore substitutes an absolute rule in favor of the status quo for the court's discretionary consideration.

Therefore, in this case, plaintiff may not recover damages in the amount of the tuition from defendant Wilburn.

The Supreme Court will soon have the opportunity to resolve the question of whether a parent who has unilaterally placed his or her child in private school is entitled to tuition reimbursement. Town of Burlington v. Dept. of Education Commission of Mass., 736 F.2d 773 (1st Cir.), cert. granted, 53 U.S.L.W. 3417 (1984). In the meantime, however, I will follow the cases of the Fourth and Second Circuits. The Burlington court held that parents who prevail ultimately on their claim that the school has failed to develop or implement an appropriate IEP are entitled to tuition benefits.

Plaintiff relies on Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981)

in support of their position that reimbursement of tuition expenses is available under the EAHCA. Holding that the district court properly declined to award compensatory damages for the expenses arising out of the child's private education tuition, the court concluded that monetary damages under the EAHCA are not allowable absent exceptional circumstances. These circumstances include situations in which the handicapped educational services in dispute were necessary to protect the physical well-being of the child or in which the defendant has acted in bad faith by failing to comply with the procedural provisions of the Education For All Handicapped Children Act. Plaintiff contends that Alexander's psychological and emotional well-being necessitated his transfer to

the private school. As the court in Anderson, however, made clear, it is only in exceptionally rare situations that unilateral transfer of a child will be justified. Moreover, I am convinced that the Stemple court's approach is correct. Just as a school district will not be allowed unilaterally to cease tuition payments during ongoing administrative or judicial proceedings so will a parent be required to abide by the status quo pending a final administrative or judicial determination. See Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982). Defendant's motion to dismiss plaintiff's claim for tuition reimbursement therefore will be granted.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.	:	
ROBERT C. WILBURN, et al	:	No. 84-2032

O R D E R

NOW, March 18, 1985, upon consideration of defendant Wilburn's motion for summary judgment, plaintiff's response thereto, the memoranda of law submitted by the parties, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that defendant's motion is GRANTED IN PART AND DENIED IN PART. Judgment is entered

for defendant and against plaintiff as to plaintiff's claim for tuition reimbursement.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., et al : CIVIL ACTION

Plaintiffs :

v.

CENTRAL BUCKS SCHOOL DISTRICT, et al., :

Defendants : No. 84-2032

MOTION TO AMEND THE COMPLAINT

Plaintiff respectfully moves this Court to grant him leave to amend the complaint in the above-captioned matter to raise certain issues not previously raised. The issues concern due process violations committed by the Secretary of Education, Robert Wilburn, through his participation in the state level

hearing, and the exorbitant amount of time spent on the administrative proceedings, both in direct violation of The Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-1461.

The reasons supporting this motion appear in the accompanying memorandum of points and authorities.

Respectfully submitted,

/s/Matthew S. Bogin
BOGIN AND EIG
1630 Connecticut Avenue,
N.W., Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for plaintiffs

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., et al	:	CIVIL ACTION
Plaintiffs	:	
v.		
CENTRAL BUCKS SCHOOL DISTRICT, et al.,	:	
Defendants	:	No. 84-2032

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND COMPLAINT

Because it is in the interest of justice, this Court should grant plaintiff's motion to amend the complaint in this matter, pursuant to Fed. R. Civ. P. 15(a).

As the Court is aware, plaintiff's counsel has only recently entered his appearance in this case. Previous counsel failed to raise a number of issues that are of great importance to

the determination of this cause, and should be raised. The first of these is the participation of Secretary of Education Wilburn in the state level review of the due process hearing.

Secretary's Wilburn's participation unquestionably violated plaintiff's rights under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §S 1400-1461. The EHA specifically provides that due process hearings shall not be conducted "by an employee of [any] agency or unit involved in the education or care of the child."[1] The Act's implementing regulations elaborate further on who is ineligible to serve as impartial hearing officer at either the local or state

---

[1]20 U.S.C § 1415(b)(2) (1981).

level. A hearing may not be conducted by a person who is an employee of a public agency involved in the care or education of the child, nor may it be conducted by anyone having a personal or professional interest in the outcome of the hearing.[2] The legislative history of the EHA demonstrates that employees of the agency involved in educating the child are prohibited from serving as hearing officers at the administrative level.[3]

Most importantly, the Third Circuit ruled, prior to the state level review in this case, that the use of an

---

[2]34 C.F.R. §§300.507(a)(1) and (2) (1982).

[3]See Sen. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in (1975) U.S. Code Cong. & Ad. New 1425, 1502.

employee of the Delaware Department of Public Instruction as a state reviewing officer was "per se a denial of the impartial review guaranteed by 20 U.S.C. § 1415(c)." Grymes v. Madden, 672 F.2d 321, 322 (3d Cir. 1982). See also, Helms v. McDaniel, 657 F.2d 800 n. 9 (5th Cir. 1981); Robert M. v. Benton, 634 F.2d 1139, 1141-42 (8th Cir. 1980).

This issue is crucial to plaintiff's case, and must be raised. It is in the interest of justice to allow it to be raised now, because it is an issue that is appropriate for resolution without a trial, thus shortening this litigation.

Another issue crucial to plaintiff's case, yet not raised previously is the exorbitant amount of time spent on administrative proceedings. The EHA's implementing regulations require that the decision at the local hearing level

be reached within forty-five days of receipt of the hearing request, 34 C.F.R. § 300.512(a), and at the state hearing level that it be reached within thirty days. 34 C.F.R. § 300.512(b). Yet, in this case considerably more time elapsed. Again, it is in the interest of justice to allow this issue to be raised here because it also is one in which the facts are clear, thus allowing for resolution without trial.

As demonstrated in this memorandum, it is in the interest of justice to allow the filing of this amended complaint. No other party will be prejudiced, and judicial economy will be

served because these issues may be decided without a trial, thus speeding resolution of the case.

Respectfully submitted,

/s/Matthew S. Bogin
BOGIN AND EIG
1630 Connecticut Avenue,
N.W., Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

CENTRAL BUCKS SCHOOL DISTRICT
and
DR. THOMAS L. NEWMAN Superintendent of the Central Bucks School District : No. 84-2032

MEMORANDUM OPINION AND ORDER

HUYETT, J. NOVEMBER 18, 1985

Plaintiff Russell A. Muth, Jr., individually and on behalf of his son, Robert Alexander Muth, has filed a motion for leave to file a second amended complaint.[1]

---

[1]It is not clear from the proposed second amended complaint whether there

(Footnote continued on next page)

Plaintiff contend that leave should be granted because he has recently retained new counsel and prior counsel failed to raise certain important claims. For the reasons stated below, I will grant the motion in part and deny it in part.

---

[1](Footnote continued from previous page)

are two plaintiffs or only one. In several places in the complaint, the term "plaintiffs' is used, but paragraph III.1 of the amended complaint states in pertinent part: "[t]he plaintiffs are Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child ..." From this language, it appears that only the father is the plaintiff despite the use of the plural. Therefore, throughout the memorandum opinion I shall refer to only one plaintiff which is consistent with the caption on the original complaint.

Federal Rule of Civil Procedure 15(a) provides in pertinent part: "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Determining when justice requires permission to amend rests within the sound discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research Corp., 401 U.S. 321 (1971). In Foman v. Davis, 371 U.S. 178 (1962), the Court held that absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party by virtue of allowance of the amendment," leave should be "freely given." Another factor which a court

may properly consider is whether the proposed amendment states a cause of action, i.e. whether it would survive a motion to dismiss. In other words, leave should not be granted where amendment would serve no purpose. 3 Moore's Federal Practice ¶15.08[4].

If permitted, this would be the second amendment plaintiff has made to his complaint. I note that the original complaint was filed on April 27, 1984, and this action was scheduled to go to trial on August 14, 1985. The delay which has resulted has been caused entirely by the filing of the present motion by plaintiff. I also note that plaintiff's previous counsel stipulated to the dismissal from this action of defendant Wilburn, then Secretary of Education. In the second amended

complaint, plaintiff seeks to bring the new Secretary of Education, Margaret Smith, back in to the case individually and in her official capacity. Plaintiff also adds several claims against defendants Central Bucks School District and Dr. Thomas L. Newman, Superintendent of that District. I will address the proposed amendment claims against the defendants in seriatim starting with the Secretary of Education.

A stipulation of dismissal pursuant to Fed.R.Civ.P. 41(a) is a dismissal without prejudice unless the stipulation states to the contrary. 5 Moore's Federal Practice ¶41.02[4]. In this case, the stipulation entered into by plaintiff's previous counsel and counsel for the Secretary of Education states in pertinent part: "[i]t is hereby Stipulated and agreed ... that the

Complaint in this action be dismissed as to defendant Robert C. Wilburn, Secretary of Education, Commonwealth of Pennsylvania." Because the stipulation does not provide that the dismissal is with prejudice it must be assumed that it is without. Nevertheless, the stipulation reflects the prejudice which may be caused to defendant Secretary of Education by bringing her into the case at this late date. Once the stipulation was entered into, all discovery between the parties ceased, and the case proceeded as if the Secretary had never been a party. As I previously noted, this case was scheduled to go to trial on August 14, 1985, but because of the plaintiff's filing the present motion, trial has been delayed. If the Secretary is brought back into the case,

additional delay will be inevitable in order to permit the Secretary to prepare adequately for trial. I note, however, that it is plaintiff, or his son, who is harmed most by the delay and it is plaintiff who has caused the delay. I am concerned that plaintiff be given every opportunity to state his claims as fully as possible.

I will address each of the claims plaintiff intends to raise against the Secretary of Education to determine whether amendment will serve any purpose. In count one of his proposed second amended complaint, plaintiff alleges that the Secretary of Education's involvement in this matter violates plaintiff's rights under the Education for All Handicapped Children Act (EHCA), 20 U.S.C. §1401 et seq. and

violates plaintiff's right to due process of law as guaranteed by the fourteenth amendment. Section 1415(b)(2) of title 20 of the United States Code states in pertinent part:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Plaintiff contends that because the Secretary of Education reviewed the hearing officer's decision and ordered

the case remanded to the hearing officer, the Secretary has violated §1415(b)(2) which provides that a parent of a handicapped child is entitled to an impartial due process hearing. Section 300.507 of title 34 of the Code of Federal Regulations requires that the hearing be held by an impartial hearing officer, i.e. a person who is not an employee of a public agency which is involved in the education or care of the child.

Section 1415(c) provides, however, for the review of a local administrative agency decision by the state educational agency. This provision would suggest that review of the administrative process may be conducted by the Secretary of Education. My understanding of plaintiff's contention, however, is that because the initial

impartial hearing, under Pennsylvania law, is conducted by the state educational agency, section 1415(c) never comes into play; section 13.32 of title 22 of the Pennsylvania Code provides that the hearing officer shall be assigned by the Secretary. Because I believe plaintiff has stated a cause of action raising essentially a legal issue which will not necessitate additional discovery, I will permit amendment of the complaint to add this claim.

In count two of the second amended complaint, plaintiff contends that the delays in the due process procedure in this case violate his rights under the EHCA and the due process clause of the fourteenth amendment. Plaintiff has never raised this issue, and to raise this issue at this time will necessitate extensive additional discovery and preparation by all of the defendants.

Nevertheless, I will permit plaintiff to add a claim based on the EHCA. I also remind plaintiff that any delay which results, and I will have to permit adequate time for defendants to prepare to defend against this issue, will be a consequence of plaintiff's actions here.

In his first amended complaint, plaintiff dropped his claim based on the equal protection and due process clauses. I specifically noted that fact in my order of April 11, 1985 modifying my opinions of March 18 and March 19. Therefore, to the extent plaintiff's claims in count one and two are based on the fourteenth amendment, I will not permit their addition to the complaint. I believe, however, that the basis of the claims raised in these two counts

really lies in the alleged violation of the EHCA.

In counts five and six of the second amended complaint plaintiff raises claims which I have previously addressed in response to defendant Secretary of Education's motion for summary judgment. To the extent plaintiff seeks reimbursement of tuition expenses from the state, amendment will not be permitted. I have previously ruled that reimbursement for tuition expenses is barred by the eleventh amendment. To the extent plaintiff seeks injunctive relief, I am reluctant to permit the amendment because this is precisely the issue upon which the stipulation to dismiss was based. To permit plaintiff to amend the complaint a second time to reinstate the precise claim which had previously been raised against the

Secretary of Education at this late date would be unduly prejudicial and would unnecessarily delay the trial. Therefore, I will deny plaintiff's request to amend the complaint to add counts five and six.

In her response to plaintiff's motion for leave to amend the complaint for a second time, the new Secretary of Education Margaret A. Smith contends that she cannot be sued individually because she was not an officer at the time of the incidents giving rise to this action and therefore took no part in any of the decision-making processes. I agree with her contention and therefore will not permit plaintiff to proceed against her individually. I do not agree, however, with Ms. Smith's contention that because she was not personally involved in the administrative process, she cannot be

sued in her official capacity for a violation arising from the fact that the appeal of the hearing officer's decision was heard by the Secretary of Education, then Secretary Wilburn. The office of Secretary of Education cannot be made immune from a lawsuit simply because a new person occupies that office.

I note that there has been a stipulation between counsel that the portion of plaintiffs' proposed second amended complaint alleging individual liability on the part of defendant Dr. Thomas L. Neman is withdrawn. Defendants Central Bucks School District also argue that amendment of the complaint to add claims based on the fourteenth amendment should not be permitted at this time because plaintiff previously dropped these claims. As I have noted in connection with my

discussion of the claims against the Secretary of Education, I shall not permit amendment of the complaint to add claims based upon the fourteenth amendment.

I will, however, permit the claim based upon the EHCA. I note that while this claim, count two, seems to be directed at the Secretary of Education, it may also apply to the other two defendants.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.		
CENTRAL BUCKS SCHOOL DISTRICT and DR. THOMAS L. NEWMAN Superintendent of the Central Bucks School District	:	No. 84-2032

ORDER

NOW, November 18, 1985, upon consideration of plaintiff's motion for leave to file a second amended complaint, defendants' responses, the memoranda of law submitted by the parties, and for the reasons stated in the accompanying memorandum opinion, IT IS ORDERED that

1. Plaintiff's motion for leave to amend is GRANTED IN PART.

2. Plaintiff shall file and serve forthwith a second amended complaint which fully complies with the accompanying memorandum opinion within fifteen days of the date of this order.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and as next friend of ROBERT ALEXANDER MUTH, Plaintiff	:	CIVIL ACTION
v.		
MARGARET A. SMITH Secretary of Education, Commonwealth of Pennsylvania	:	
THOMAS L. NEWMAN Superintendent, Central Bucks School District,	:	
CENTRAL BUCKS SCHOOL DISTRICT, Defendants	:	No. 84-2032

SECOND AMENDED COMPLAINT

I. INTRODUCTION

This case demonstrates the harm that can occur when there is a failure to provide a severely learning disabled child with what Congress sought to

guarantee in the Education for All Handicapped Children Act ("EHA"), a free appropriate education. The detailed and elaborate procedures developed by Congress in the EHA were designed to prevent what has occurred in this case, such substantial delays in providing a free appropriate education that the right Congress sought to protect is vitiated. Without this Court's intervention, Alexander Muth will be deprived of the services to which he is entitled, and which are necessary to allow him to function in our society.

II. JURISDICTION

This Court has jurisdiction pursuant to the Education for Handicapped Children Act ("EHA"), 20 U.S.C. §§1415(2) and (4) and 28 U.S.C. §1331.

III. PARTIES

1. The plaintiff is Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child as defined by 20 U.S.C. §1401(15), and thus eligible for services provided under the EHA. The Muths reside at 66 Springs Drive, Doylestown, Pennsylvania 18901, which is located in the Central Bucks School District.

2. Margaret A. Smith is the Secretary of Education of the Commonwealth of Pennsylvania, and as such is the head of the "state educational agency" ("SEA"), as defined by 20 U.S.C. §1401(7). As head of the SEA defendant Smith is responsible for insuring that all handicapped children, including Alexander Muth, are provided with a free appropriate education.

She is sued in her capacity as head of the SEA. Defendant Smith's address is Box 911, Harrisburg, Pa. 17126.

3. Defendant Thomas L. Newman is the Superintendent of the Central Bucks School District, the "local educational agency" ("LEA") as defined by 20 U.S.C. §1401(8). As head of the LEA, defendant Newman is responsible for insuring that all handicapped children in the Central Bucks School District are provided with a free appropriate education. His business address is 315 West State Street, Doylestown, Pa. 18901. He is sued in his official capacity.

4. Defendant Central Bucks School District ("District") is the LEA which is charged by the EHA with providing Alexander Muth, and all other handicapped children under its

jurisdiction, with a free appropriate education.

IV. FACTUAL ALLEGATIONS

5. Alexander Muth is a handicapped child within the meaning of the EHA.

6. Specifically, his handicapping condition is that of specific learning disabilities.

7. Alexander Muth was enrolled in the Paul W. Kutz Elementary School, a program operated by defendant District, in September, 1980.

8. He attended the Kutz School during school years 1980-81 and 1981-82.

9. In September of 1982, he entered the Lenape Junior High School, also a program operated by defendant District.

10. He attended Lenape Junior High School for the entire 1982-83 school year.

11. Prior to his entry at the Kutz School, Alexander Muth was evaluated by Dr. Thomas Atkins, a clinical psychologist at The Children's Hospital of Philadelphia.

12. Dr. Atkins determined that Alexander was learning disabled with severe deficits in language.

13. When he began at the Kutz School, Alexander Muth was placed by defendant District in a learning disabilities resource room program.

14. He continued in that program during the 1980-81 school year.

15. The resource room program was continued during the 1981-82 school year.

16. Defendant District modified Alexander's program when he began Lenape Junior High School and he was placed in a resource room solely for reading and mathematics and was placed in regular education for all other subjects.

17. Alexander did not progress during the 1982-83 school year at Lenape Junior High School.

18. Alexander began the 1983-84 school year at Lenape, but shortly after the start of the school year he was placed by his father at the Landmark School in Prides Crossing, Massachusetts.

19. On June 17, 1983, plaintiff Russell Muth requested a due process hearing concerning the lack of an appropriate education for his son, Alexander.

20. On September 30, 1983, a due process hearing was held pursuant to Mr. Muth's request.

21. Neither Russell nor Alexander Muth consented to any extension of the requirements contained in 34 C.F.R. §300.512(a).

22. On October 31, 1983, Vernard Trent, the Hearing Officer, rendered his decision.

23. In that decision, the Hearing Officer held that the individualized educational program developed by defendant District and its proposed program were not appropriate to meet the child's needs.

24. The Hearing Officer did not order the child's placement in a particular program, but he did require the District to provide "special

activities or services not ordinarily provided in the regular program."

25. Both the Muths and defendant District filed exceptions to the Hearing Officer's decision with the Secretary of Education.

26. The Secretary did not hold a hearing.

27. On January 23, 1984, the Secretary issued a decision remanding the matter back to the hearing Officer for further proceedings.

28. The Secretary held that the Hearing Officer erred in not considering the defendant District's alleged modifications to the IEP.

29. The Secretary's decision was filed more than thirty days after the receipt of the Muth's exceptions.

30. The Muths did not consent to any extension of the timelines contained in 34 C.F.R. §300.512(b).

31. On or about September 14, 1983, Alexander Muth was placed at the Landmark School in Prides Crossing, Massachusetts, a program specializing in the education of language-impaired, learning disabled children, and an appropriate educational program for Alexander Muth.

32. On July 25, 1984, the Hearing Officer rendered a second decision in this case.

33. This decision was rendered over one year after the request for a due process hearing was received.

34. The plaintiffs did not consent to this extension of the timelines contained in 34 C.F.R. §300.512(a).

COUNT I

35. Plaintiffs repeat and reallege paragraphs 1-34.

36. The Secretary of Education's participation in this matter violates plaintiff's rights under the EHA, in particular those guaranteed by 20 U.S.C. §1415(b)(2), as interpreted by the United States Court of Appeals for the Third Circuit in Grymes v. Madden, 672 F.2d 231.

COUNT II

37. Plaintiffs repeat and reallege paragraphs 1-36.

38. The delays in the due process system in this case violate plaintiffs' rights under the EHA, in particular those guaranteed by 34 C.F.R. §300.512.

COUNT III

39. Plaintiffs repeat and reallege paragraphs 1-38.

40. The failure to defendant District to provide Alexander Muth with a free appropriate education violates plaintiff's rights under the EHA.

COUNT IV

41. Plaintiffs repeat and reallege paragraphs 1-40.

42. Defendant District's refusal to place Alexander Muth at the Landmark School violates his rights under the EHA.

WHEREFORE, plaintiff respectfully requests that this Court:

1. Enter judgment for plaintiff;

2. Order defendants to place and fund Alexander Muth at the Landmark School for the 1983-84 school year;

3. Order defendants to reimburse Russell Muth for any funds he expended in providing Alexander Muth with a free appropriate education;

4. Enjoin the Secretary of Education of the Commonwealth of Pennsylvania from participating in the due process system;

5. Order the Secretary to provide impartial hearing officers in state level appeals;

6. Award plaintiffs the sum of twenty-five thousand dollars ($25,000.00) as compensatory damages jointly and severally against all defendants for violation of plaintiffs' rights to due process of law;

7. Award plaintiffs attorneys fees and other costs of this action;

8. Award plaintiffs any other relief this Court deems just.

/S/ Matthew B. Bogin
Bogin and Eig
1630 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiffs

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH,	:	CIVIL ACTION
Plaintiff,	:	
v.		
CENTRAL BUCKS SCHOOL DISTRICT, et al.,	:	
Defendants.	:	No. 84-2032

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff respectfully requests that this Court enter summary judgment in his favor. The grounds for this motion appear in the accompanying memorandum of points and authorities and exhibits.

Respectfully submitted,

/s/Matthew B. Bogin

BOGIN & EIG
1630 Connecticut Avenue, N.W.
Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiff

[Certificate of Service omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH, Plaintiff : CIVIL ACTION

v.

CENTRAL BUCKS SCHOOL DISTRICT, et al, Defendants : No. 84-2032

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Robert Alexander Muth, ("Alexander") is a handicapped child, entitled to special education and related services under the Education for All Handicapped Children Act ("EHA"). He is diagnosed as learning disabled, with severe language deficits. Plaintiff's Exhibit 1, pp. 1, 3.

In September, 1980, Alexander was enrolled in the Paul W. Kutz Elementary School -- a program operated by defendant Central Bucks School District ("School District") -- where he was placed in a learning disabilities resource room program. He remained in that placement for the academic years 1980-81 and 1981-82. In September, 1982, Alexander was enrolled at Lenape Junior High School --another program operated by defendant School District. At Lenape, the School District placed Alexander in regular education for all subjects except reading and mathematics. Plaintiff's Exhibit 2, p. 1. He remained in that placement for the entire 1982-83 academic year, but did not progress. Plaintiff's Exhibit 2, p. 3.

On June 17, 1983, plaintiff requested a due process hearing to address the School District's failure to provide an appropriate education for Alexander. A due process hearing was held on September 30, 1983, and the Hearing Officer rendered a decision on October 31, 1983. Plaintiff's Exhibit 1. This violated the timeline contained in 22 Pa. Code § 13.32(21), which requires the Hearing Officer to rule within twenty days. Plaintiff did not consent to any extension of time.

The Hearing Officer found that the School District's Individualized Education Program ("IEP") and proposed program were inappropriate to meet Alexander's educational needs. Id. at pp. 4-5; Plaintiff's Exhibit 2, p.2. The Hearing Officer did not order placement in any particular program;

however, he did direct the School District to "explore alternative placement in a more restrictive educational setting." Plaintiff's Exhibit 1, p. 5.

Plaintiff was aggrieved by this result; however, under state law he did not have the option of initiating litigation, but rather was forced to file exceptions with the Secretary of Education ("Secretary"). 22 Pa. Code § 13.32(24); and see Lisa H. v. State Board of Education, 447 A.2d 669, 674-75 (Pa. 1982). See also Plaintiff's Exhibit 5 (the State's due process explanations which are supplied to parents of handicapped children such as Alexander Muth). The Secretary did not hold a hearing, but rendered a decision on January 23, 1984, holding that the Hearing Officer erred by

failing to consider the School District's alleged modifications to Alexander's IEP, and remanding the matter to the Hearing Officer for further proceedings.

Plaintiff's Exhibit 2, pp. 3-4. The Secretary did not render his decision within thirty days, as prescribed by law. 34 C.F.R. § 300.512(b). Again, plaintiff had not consented to any extension of time.

Because there had been no resolution of plaintiff's dispute with the School District when school began in September, 1983, Alexander was enrolled again at Lenape. However, the obvious inappropriateness of this placement caused the plaintiff to enroll Alexander at the Landmark School in Prides Crossing, Massachusetts on or about September 14, 1983. The Landmark School

provides a program that specializes in the education of language-impaired, learning disabled children. This was an appropriate placement for Alexander for the 1983-84 academic year.

On July 25, 1984, more than one year after plaintiff's request for a due process hearing, the Hearing Officer issued a second decision in Alexander's case. Plaintiff's Exhibit 3. The legal time limits were again violated, without the plaintiff's consent. 34 C.F.R. § 300.512(a). The Hearing Officer found the School District's program appropriate, in light of "modifications" made to Alexander's IEP. Id. at p. 2. Plaintiff again was forced to file exceptions to the Secretary of Education. The Secretary dismissed plaintiff's exceptions and adopted the Hearing Officer's findings of fact,

conclusions of law and recommendations. Plaintiff's Exhibit 4. Appeal to this Court followed.

ARGUMENT

There are no material facts in dispute and plaintiff is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56.

I. The Procedures Followed Here Violated The "Finality" Requirement of Federal Law

The Education for All Handicapped Children Act ("EHA"), provides that participating states may elect to establish either a one-level or a two-level hearing process. 20 U.S.C. § 1415. If a state elects to establish a one-level system, hearings are conducted by the State Education Agency

("SEA"), and the decisions of the Hearing Officer are final administrative decisions, susceptible of being appealed to a court of competent jurisdiction. Id. at §§ 1415(b)(2) and (e)(1). If a state chooses the two-level system, a hearing will be conducted by the Local Education Agency ("LEA"), e.g., the defendant School District in this case, with the right to appeal an adverse determination to the SEA, and then to court. Id. at §§ 1415(b)(2) and (c). In order to participate in the federal program, a state must implement one of these impartial hearing systems.[1]

---

[1]The EHA conditions a state's eligibility for participation on the establishment of "procedural safeguards are required by section 1415 of this title." 20 U.S.C. § 1415(5).

Pennsylvania has instituted a system that fits neither description. Instead, it has fashioned an illegal hybrid process that deprives handicapped children and their parents of the finality guaranteed to them under the EHA, as well as the impartiality to which they are entitled under federal law. See Section II., infra. Pennsylvania law provides that due process hearings are to be conducted by "the Secretary or the designee of the Secretary [of Education]." 22 Pa. Code § 13.32(2). In practice, the Secretary does not personally conduct due process hearings; however, the Secretary designates individuals to conduct the hearings and then hears appeals from the decisions of these designees. Id. at § 13.32(24).

Thus, the hearing is conducted by the SEA, but is not a final administrative decision -- the prerequisite to initiating litigation. Instead, the same state agency that rendered the original decision is responsible for reviewing that decision. Courts that have considered this issue previously have found that such a system contravenes federal law, notwithstanding any attempt to characterize the Hearing Officer as a "special master" making a "report" to the Secretary of Education.[2]

In Helms v. McDaniel, 657 F.2d 800, 805-06 (1981), the Fifth Circuit held that:

---

[2]There are strong indications that this is the view in Pennsylvania. Pa. Code §§ 13.32(2) and (12).

In treating the findings of the state reviewing officer as the findings of a special master, the state board [of Education] fails to comply with the requirement that this decision be final unless appealed to state or federal court .... This system not only contravenes the specific requirement of finality; it undermines the enforcement structure created by the Act. The EHA provides that the goal of an appropriate education will be achieved through conference and hearings. To safeguard the right to an appropriate education, Congress made unmistakably clear that the hearings provided by the Act were to be impartial and result in final decisions. If a state board may, at its discretion, reject the results of this process, the entire system of procedural safeguards is nullified at a single stroke.

This is inconsistent with the conclusion reached a year earlier in Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), affirmed in part and vacated in part on other grounds, 645 F.2d 592 (8th Cir. 1981).[3] The Court in Monahan considered a similar due process hearing structure and determined that:

> [I]t appears that [under state law] the Commissioner of Education has the discretionary authority to accept, reject or modify the decision made in the due process hearing. Such discretion conflicts with the federal requirement that the decision made in the due

---

[3]Subsequently, dismissed as moot sub nom Rose v. State of Nebraska, 530 F. Supp. 295 (D. Neb. 1981), dismissal for mootness affirmed in part and vacated in part sub nom Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982).

> process hearing shall be final except for judicial review. [Citations omitted].

491 F. Supp. at 1091. As elucidated in both of the opinions cited above, it is impermissible for a state to set up a system that allows the Secretary of Education to review the findings and decision of a state-level hearing officer. Yet, that is exactly what the State of Pennsylvania has done, in violation of the EHA and the Supremcy Clause of the United States Constitution.[4] This system has deprived plaintiff and his minor son of their due process rights.

---

[4]It is well-established that federal laws are supreme over the constitution or laws of any state. M'Culloch v. Maryland, 17 U.S. 406 (1819).

II. The Procedures Followed Here Violated The Impartiality Requirement of Federal Law

The EHA requires that state-level reviewing officers be "impartial." 20 U.S.C. § 1415(c).[5] Thus, it would be improper for the Secretary of Education to perform this function even if the Pennsylvania Department of Education were authorized to review the Hearing Officer's decision. This point has been made crystal clear by the courts: employees of the SEA, including the Secretary, are barred from serving in the capacity of reviewing

---

[5]In order to be "impartial," at the minimum, the Hearing Officer cannot be "an employee of such agency or unit involved in the education or care of the child." 20 U.S.C. § 1415(b)(2).

officers.[6]

The Secretary's involvement in this case is surprising in light of binding precedent in this jurisdiction prohibiting such action. In Grymes v. Madden, 672 F.2 321, 323 (1982), the Third Circuit held that employees of the Delaware SEA could not be considered impartial as they were "involved in the education ... of the child," however indirectly. Cf. 34 C.F.R. § 300.507(a) (specifically providing that a hearing officer may not be "involved in the education or care of the child.")

---

[6]The legislative history corroborates this view. Sen Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1502; and see Mills v. Board of Education, 348 F. Supp. 866, 881 (D. D.C. 1972).

Without question, the Pennsylvania Secretary of Education, who exercises extensive control over local school districts, both fiscal and regulatory, is at least equally "involved" in the education of handicapped children as is the Delaware SEA. Thus, Grymes is dispositive of the issue in this case. See also Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980); Helms v. McDaniel, 657 F.2d 800, 805 and n. 9 (5th Cir. 1981); Vogel v. School Board of Montrose R-14 School District, 491 F. Supp. 989 (W.D. Mo. 1980) (all involving action on the part of the chief administrative officer of the state's department of education, or the deputy chief administrator).

One recent case found that even officers or employees of local school systems not attended by the child in

question, and university personnel who have been involved in formulating state policy regarding the education of handicapped children, are barred from serving as hearing officers. Mason v. Teague, 749 F.2d 652 (11th Cir. 1984).

Thus, review by the Secretary violated the EHA's requirement of "impartiality," and deprived plaintiff of his due process rights.

III. THE COURT SHOULD ORDER DEFENDANTS TO REIMBURSE PLAINTIFF FOR THE COSTS AT LANDMARK

A. Reimbursement Is Allowed Against These Defendants

As the Supreme Court has made clear, this Court's task in this case is to determine whether the state has followed the procedures set out in the EHA, and whether the IEP is reasonably calculated

to provide educational benefit to Alexander Muth. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). As demonstrated in the previous sections, the SEA and LEA failed to comply with the procedural requirements of the EHA, and thus should be responsible for the tuition at Landmark School.[7]

Recently, the Supreme Court has made clear that reimbursement of tuition costs is the appropriate remedy for procedural violations. Town of Burlington v. Dept. of Educ., 105 S. Ct. 1996 (1985). This decision affirmed the

---

[7]As for the IEP, the Hearing Officer found that it was not appropriate to meet Robert's needs. This decision was illegally reversed by the Secretary; thus, the Hearing Officer's determination should be given "due weight." Rowley, at 458 U.S. 206.

First Circuit's finding that the procedural errors committed in that case formed the basis for tuition reimbursement. See Township of Burlington v. Dept. of Educ., 736 F.2d 773, 794 (1st Cir. 1984). Thus, given the defendants' use of a procedure outside the bounds of the EHA, there is no question that they should be responsible for Alexander's tuition at Landmark.[8]

---

[8]Although the illegal procedure is mandated by Pennsylvania law, and it was defendant Secretary who illegally reversed the Hearing Officer's determination, defendant School District asked for and received this illegal act. Additionally, under the EHA, defendant School District is responsible for complying with the procedural requirements.

Although this Court seemingly has declined to allow plaintiff to seek reimbursement from the Secretary, Muth v. Central Bucks School District, C.A. 84-2032, Memorandum Opinion and Order (November 19, 1985), in light of the Supreme Court's decision in Burlington, it is clear that reimbursement is available.[9] The EHA

---

[9]Unless reimbursement is allowed against the Secretary, then the SEA will be free to commit unlimited violations of the EHA, without any possibility of reprisal. Given the congressional grant of jurisdiction to the District Courts under the EHA, this obviously would defy logic. Further, it is significant that the stipulation referred to in the Court's Memorandum was entered into by previous counsel. It is respectfully suggested that previous counsel was not familiar with this area of the law. Additionally, that stipulation was entered into prior to the Supreme Court's holding in Burlington, when the right to reimbursement was less clear.

provides that this Court is to "grant such relief as the court deems appropriate." 20 U.S.C. § 1415(e)(2). As Burlington makes clear, appropriate relief includes reimbursement for tuition. 105 S. Ct. at 2004-05.

There is no bar to an award of reimbursement against the Secretary. Indeed, in passing the EHA, Congress has abrogated any immunity that the Secretary may have had under the Eleventh Amendment.[10] This holding was most recently reached by the First Circuit in David D v. Dartmouth School District, 775 F.2d 411 (1985).

---

[10]Because plaintiff assumes that the funds used for reimbursement would be Pennsylvania funds, and not the Secretary's personal funds, the issue will be analyzed according to Eleventh Amendment principles.

In David D., the court examined whether Congress effectively overrode the states' sovereign immunity in passing the EHA. In examining that issue, the First Circuit applied the test developed by the Supreme Court last term in Atascadero State Hospital v. Scanlon, 53 U.S.L.W. 4985 (June 28, 1985), and determined that Congress had abrogated that immunity.

In passing the EHA, Congress has used its powers under Section 5 of the Fourteenth Amendment to waive this immunity. This is unequivocally clear from the plain language of the statute: "It is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law." 20 U.S.C. 1400(b)(9)

(emphasis added). This distinguishes the EHA from the Rehabilitation Act, which was at issue in Atascadero, since the Rehabilitation Act contains no such language. Additionally, the Rehabilitation Act does not give states the option of participating in a voluntary program that entails a grant of federal funds, as does the EHA. 20 U.S.C. §§ 1411-12.

Additionally, the First Circuit looked to the Supreme Court's decision in Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 3486 (1984), which held that the EHA was designed to implement the Fourteenth Amendment's guarantee of equal protection. It should be noted that his Court was the first to hold that a handicapped child's right to ar appropriate education was grounded in the Fourteenth Amendment. Pennsylvania Ass'n for Retarded Citizens v.

Commonwealth, 334 F. Supp. 1257 (1971), and 343 F. Supp. 279 (1972).[11] The First Circuit's decision is only the latest in a line of cases uniformly holding that the EHA's passage abrogated the states' immunity under the Eleventh Amendment. In Department of Education v. Katherine D., 727 F.2d 809 (1984), the Ninth Circuit held similarly. Indeed, in that case, the Court held that an award of tuition reimbursement against the state should be granted. Dept. of Educ. v. Katherine D., 727 F.2d 818. In accord is the Fifth Circuit's decision in Crawford v. Pittman, 708 F.2d 1028, 1039 (1983), which

---

[11]This case and Mills v. Board of Educ., 348 F. Supp. 886 (D. D.C. 1972) were the impetus for passage of the EHA, and supplied many of its procedural protections. Smith v. Robinson, 104 S. Ct. at 3468; Rowley, 458 U.S. at 193-94.

explictly held that the EHA was enacted "under section five of the fourteenth amendment."[12]

Abrogating the Eleventh Amendment immunity also fits the statutory scheme of the EHA. Under that scheme, it is the state that must submit an annual plan to the Federal Government, 20 U.S.C. § 1413, and it is the state that receives the funds under the EHA. Id. at § 1411. Furthermore, it is the state that must assure compliance with the Act, and therefore, basically controls the child's education. In light of the explicit grant of jurisdiction to the District Courts, it would be contrary to all logic to

---

[12]District Courts in Kerr Center Parents Ass'n. v. Charles, 581 F. Supp. 166 (D. Ore. 1983) and Parks v. Pavkovich, 536 F. Supp. 296 (N.D. Ill. 1982) are in agreement.

interpret the EHA to bar suits against the states. Indeed, such an interpretation would completely vitiate the procedural protections of the EHA, which are its very heart. Rowley, 458 U.S. at 205.

B. The Court Should Order Reimbursement In This Case

Because the EHA violations here have deprived Alexander Muth of his right to a free, appropriate education, and have deprived him of his procedural protections under the EHA, this Court should exercise its equitable powers and order reimbursement for the tuition at Landmark School, an appropriate placement.

Under the facts here, the Court should order reimbursement for tuition at Landmark. As demonstrated, the only

valid administrative decision in this case is the Hearing Officer's October 31, 1983 decision. Plaintiff's Exhibit 1. All subsequent actions, including the Secretary's purported decision, the hearing after remand, and the Secretary's second decision, were products of illegal conduct and are void. Plaintiff's Exhibits 2-4. When one winnows the permitted conduct from the illegal, one is left with a situation that closely approximates that in Burlington. As in that case, there was an administrative decision in the parent's favor, and that decision required that the parent take action when the school district did not.

The Hearing Officer found that the program offered to Alexander Muth, in which he actually was placed at the start of the 1983-84 school year, was

inappropriate. Thus, the defendant School District had not provided him with a free appropriate education. Under Burlington, the parent had the right -- and indeed the obligation -- to seek an appropriate placement for his son. The First Circuit held, in a portion of Burlington unreviewed by the Supreme Court, that the parent has the right to rely on the decision from the due process hearing. 736 F.2d at 799. Mr. Muth did exactly that. Moreover, the defendants, by following a clearly illegal procedure,[13] allowed the Hearing Officer's decision to become final. To this day, no appeal pursuant

---

[13]By the time that the defendant School District filed its exceptions and defendant Secretary purported to remand to case back to the Hearing officer, Grymes v. Madden had been the law in this Circuit for over a year.

to 20 U.S.C. § 1415 has been filed by any of the defendants in this case. They are thus barred from contesting the Hearing Officer's determination in this forum.

As in Burlington, the only possible appropriate placement for Alexander is Landmark. Because the education must be "free" as well as "appropriate," Burlington, 104 S. Ct. at 2004, it is clear that defendants should fund Landmark for the 1983-84 school year.

Additionally, Landmark must be considered Alexander's "current placement," 20 U.S.C. 1415(e)(3), and defendants are required to maintain that placement. Therefore, defendants should be required to reimburse plaintiff for all tuition and other costs, and to keep Alexander at Landmark.

Ordering reimbursement at this stage of the proceedings comports with the Supreme Court's decision in Burlington. As the Court recognized, reimbursement is an "equitable" remedy. 104 S. Ct. at 2005. In this case, the equities strongly militate towards reimbursement. The procedural safeguards are the backbone of the EHA, and defendants' violations here have turned the process into a charade. See e.g., McKenzie v. Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The underlying assumption of the Act is that to the extent procedural mechanisms are faithfully employed, handicapped children will be afforded an appropriate education.")

Reimbursement effectuates the policy behind the EHA. It rectifies the procedural errors, thus having a

deterrent effect, while assuring that Alexander Muth receives his due -- a free, appropriate public education.

CONCLUSION

Because there is no genuine issue of material fact remains in dispute, and plaintiff has established his entitlement to judgment as a matter of law, this Court should grant plaintiff's motion.

Respectfully submitted,

/s/Matthew B. Bogin

BOGIN & EIG
1630 Connecticut Ave., N.W.
Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of His minor child ROBERT ALEXANDER MUTH, Plaintiffs : CIVIL ACTION

v.

MARGARET A. SMITH, et al, Defendants : No. 84-2032

DEFENDANT SMITH'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PROCEDURAL POSTURE

In a Memorandum Opinion of November 18, 1985, this Court granted plaintiff permission to file a Second Amended Complaint. As to the Secretary of Education, Margaret A. Smith, the Court has permitted the plaintiff to proceed on two claims: first, plaintiff's allegation in Count I that the Secretary's participation in the due

process hearing procedure violates plaintiff's rights pursuant to the Education of All Handicapped Children Act of 1975 (hereafter "EHCA") and second, that the delay in the hearing process has violated plaintiff's rights under that statute as well. The Court precluded plaintiff from raising these claims under the Due Process Clause of the Fourteenth Amendment and further precluded plaintiff from raising the issue of reimbursement of tuition expenses as to the state defendant.

Plaintiff has filed a Motion for Summary Judgment, defendant Smith's response to that Motion will be limited to those claims which this Court has permitted plaintiff to pursue.

ARGUMENT

I. PENNSYLVANIA'S DUE PROCESS HEARING SCHEME CONFORMS WITH THE PROVISIONS AND GUIDELINES OF THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT OF 1975.

A. Statutory and Regulatory Due Process Hearing Scheme

In 1975, Congress enacted the Education of All Handicapped Children Act, 20 U.S.C.A. §§1411-1420. This Act provides federal funding for the education of handicapped children to states who meet the Act's requirements. The Act does not specify the nature of the educational programs for qualifying states but relies, instead, on procedural safeguards which involve parents in educational placement decisions. The Act outlines procedures whereby parents may challenge the

appropriateness of their child's educational program.

Section 1415 of the Act establishes procedural safeguards that must be followed by any state or local agency that receives assistance under the Act. It is noteworthy that subsection (b)(1) of §1415 begins with the language: "The procedures required by this section [§1415] shall include, but shall not be limited to ...." The section then proceeds to enumerate review procedures. Subsection (b)(2) requires that parents be given the opportunity for an "impartial due process hearing" at either the state-educational-agency level or the local level as determined by state law. If the hearing is conducted at the local level, then the party aggrieved may appeal to the state educational agency for an impartial review and an independent decision.

Section 1415(c). Subsection (e)(1) requires that the decision at the local level be final unless appealed to the state agency, and that the decision of the state agency be final unless a civil action is brought in accordance with §1415(e)(2).

Pennsylvania's due process hearing procedures, 22 Pa.Code §13.31 et seq. substantially conform with EHCA requirements by providing the parent who wishes to challenge his child's educational program with (1) a placement conference with the school (2) a full hearing before a hearing officer and (3) the opportunity to appeal the hearing officer's decision to the Secretary of Education, 22 Pa.Code §13.32(2)(24).

B. Pennsylvania's Initial Due Process Hearing Is A Local Agency Hearing Resulting In A Final Decision

Plaintiff's challenge to Pennsylvania's due process hearing scheme is based on two flawed and unwarranted assumptions: first, plaintiff characterizes the initial hearing as a state-agency hearing rather than a local agency hearing, and second, he characterizes the hearing examiner's report as that of a special master whose findings are not final but a mere recommendation to the Secretary. Turning to the first assumption regarding the nature of the initial hearing, plaintiff, relies on language in 22 Pa.Code §13.32(2), which provides that due process hearings are to be conducted by "the Secretary or the designee of the Secretary". Plaintiff

himself admits, Memorandum of Law in Support of Motion for Summary Judgment at p. 5, that "[i]n practice, the Secretary does not personally conduct due process hearings; however, the Secretary designates individuals to conduct the hearings and then hears appeals from the decisions of these designees".

Focusing on the practice, plaintiff appears to argue that the mere designation of a hearing examiner by the Secretary makes the hearing a state agency hearing. That is simply not so, because the obligation to designate such examiners is imposed on the Secretary not only by Pennsylvania regulations but by federal regulations implementing the EHCA which require that the state agency maintain a list of persons who shall

serve as hearing officers. 45 C.F.R. 121a. 507 (1979).

Maintaining such a list is the Secretary's only connection with the initial hearing procedure, specific assignment of hearing examiners is the responsibility of the Technical Assistance Group for the Right to Education, a special project funded by the Pennsylvania Department of Education but administered, managed and supervised by the Central Susquehanna Intermediate Unit. [See Affidavit of Linda O'Connor, p. 1, incorporated herein by reference and attached as Exhibit II to Defendant Wilburn's Motion for Summary Judgment.] Moreover, it is the local educational agency, the school district, which actually conducts the initial hearing. The school district receives the hearing request, schedules hearings, notifies

parents of all schedules and holds the hearing in the school district. To summarize, at the initial due process hearing stage, all contacts occur between parents and the local educational agency with the Secretary's involvement limited to maintaining a list of impartial hearing examiners pursuant to federal and state regulations. Defendant submits that all indicia which characterize this initial due process hearing mark it as a local agency hearing before an impartial hearing examiner.

Addressing the second assumption upon which plaintiff's claim rests, that the report of the hearing examiner is not a final report but merely a recommendation to the Secretary, the Pennsylvania regulations clearly provide that the decision of the hearing officer

may be appealed to the Secretary. 22 Pa.Code §13.32(24). Aside from the obvious implications of the language emphasized, what occurs in practice and what occurred in plaintiff's situation, is that the examiner made a decision which would have been final if neither party had appealed. The existence of the option to appeal does not render the examiner's decision a master's report reviewable by the Secretary - plaintiff's tortuous view of the process ignores the language of the regulations as well as the actual practice.

It is only if, and when, either party decides to appeal the hearing examiner's decision that the state agency level review is made by the Secretary of Education.

This process conforms precisely with the provisions in 20 U.S.C. §1514(c).[1]

Once plaintiff has erroneously characterized the hearing and review process, he analyzes the due process procedure in light of Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981) and Monahan v. State of Nebraska, 491 F.Supp. 1074 (1980). Both of those cases are clearly distinguishable, on the facts, from the case at bar.

---

[1]This subsection provides:

> (c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

In Helms, the Fifth Circuit Court of Appeals upheld a two-tiered local agency hearing but found statutorily impermissible a similar two-tier state level hearing procedure. The appellate court pointed out that where the findings of the state reviewing officer are treated as findings of a special master reviewable before a state board, the state board fails to comply with the finality requirement of 20 U.S.C. §1415(e).

In Monahan, the court was faced with a due process hearing at the state agency level: however, the hearing officer's decision was submitted to the Commissioner of Education who had the discretionary authority to accept, reject, or modify the decision of the hearing officer. The court there held that such discretion in the Commissioner of Education conflicts with the federal

requirement that the decision made in the due process hearing shall be final except for judicial review.

It is defendant Smith's position that Helms and Monahan are factually distinguishable from the case at bar. Beyond the factual distinction, and assuming without admitting that Pennsylvania does indeed have a two-tiered state agency level procedure, defendant believes that the better view has recently been enunciated by the Supreme Court of Rhode Island when it stated:

> A careful examination of §1415 reveals that the requirements enunciated therein establish a bare minimum of protective safeguards. This interpretation of the statute is mandated by the language "shall include, but shall not be limited to" appearing at the beginning of §1415.

> Congress clearly contemplates a certain amount of flexibility for the states in meeting the requirements of the act, provided the state protections afforded handicapped children do not fall below the level set by Congress. It is axiomatic that a state may therefore provide greater protection without running afoul of the federal framework. The Rhode Island statutory scheme at issue here[2] affords the handicapped child and his or her parents greater protection than the act requires. It also embodies an important public policy decision that the resolution of most education-related controversies in this state is best accomplished by a three-level review process. Certainly the federal act never anticipated that handicapped children would

---

[2]The Rhode Island statutory scheme provided for a local hearing before an impartial hearing officer with a right to appeal to the Commissioner of Education whose decision was, in turn applicable to the Board of Regents.

> be denied the rights enjoyed by non-handicapped children under state law. ... Although it is true ... that prompt decisions are essential in this area, we decline to favor speed over the full protection of due process rights.

In re Michael C. and The Coventry School Department, et al, 487 A.2d 495, 499 (1985).

Defendant believes that the EHCA, taken as a whole, affords the state much flexibility in implementing the procedural safeguards mandated by §1415. As the Court stated in Eberle v. Board of Public Education, 444 F.Supp. 41, 43 (D.C. Pa. 1977):

> These subsections provide the basic structure for the establishment of a review procedure by the states. More elaborate due process guarantees may be instituted by the individual states.

The legislative history supports this concept of flexibility; in their report on the 1975 amendments, the conferees reported that they did "not intend that this provision [§1415] will require changes in existing arrangements where due process hearings are conducted at the level of the State educational agency rather than at the local level." Statement of Senator Williams, Congressional Record-Senate, for November 19, 1975 at 37415.

Evidently, while the drafters of the act felt that further review was unnecessary when the due process hearing was conducted at the state level, they certainly did not preclude it.

The legislators' interest in finality is clearly motivated by an interest in resolving disputes over individual education plans without delay. It makes little difference

whether the two-tier procedure consists of local hearing with state review or whether the two-tier procedure is state hearing with state-level review. Defendant believes that this is the relevant focus and one which has been ignored by the plaintiff.

C. The Secretary of Education Is An Appropriate Review Officer

Plaintiff contends that Pennsylvania's Secretary of Education is precluded from participating in the due process procedure because the Secretary is not an "impartial" reviewing officer as required by 20 U.S.C. §1415(c). Plaintiff relies on Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) which held that statutory term "impartial review" precluded the use of Delaware State

Board employees from participating as review officers. Plaintiff's reliance on Grymes is clearly inappropriate for the simple reason that the Secretary of Education is a high public official whose gubernatorial appointment distinguishes her from "employees" of the Board. See Brandon v. Wisconsin Department of Public Instruction, 595 F.Supp. 740 (1984). Similarly, Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980) is unpersuasive because there too, the hearing officer whose impartiality was challenged was an employee of the State Board of Public Instruction.

Finally, plaintiff's challenge to the Secretary's power to review the decision of the hearing officer must fail because he has waived his right to raise this issue in federal court through his silence during the

administrative process. Plaintiff has offered no excuse for this failure and should now be barred from litigating the issue in this forum. As the Supreme Court of the United States has stated:

> Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has an opportunity for correction in order to raise issues reviewable by the courts.

United States v. Tucker Truck Lines, 344 U.S. 33, 37; 73 S.Ct. 67, 69 (1952). See also, Cain v. Yukon Public School District, 775 F.2d 15, 20 (10th Cir. 1985); Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Savka v. Commonwealth of Pennsylvania, 403 A.2d 142 (Cmwlth. Ct. 1979).

D. Any Delay In The Administrative Procedure Is Either Caused By Plaintiff Or Non-prejudical To Plaintiff

Defendant Smith joins in, and incorporates by reference, the Memorandum of Law in Support of Defendants' Central Bucks School District and Dr. Thomas L. Newman's Answer to Motion for Summary Judgment. Specifically, defendant Smith relies on the affidavits submitted in support of school district defendants as they relate to the issue of delay in the due process procedure.

Defendant Smith submits that the affidavits of N. Robert Laws, Blum-Moore Reporting Services and Joanne D. Sommer, Esquire show that the greatest delay in the procedure was caused by plaintiff himself and that he has not alleged any prejudice from any delays caused by defendant here.

E. Defendant Smith Objects To the Exhibits Attached To Plaintiff's Motion For Summary Judgment On The Basis That They Are Inadmissable As Hearsay.

CONCLUSION

For all the reasons advanced above, defendant Smith requests that the Court deny plaintiff's Motion for Summary Judgment and requests that this submission be regarded as a cross-motion for summary judgment.

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

BY: /S/MARIA PARISI VICKERS
SENIOR DEPUTY ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 560-2402

[Certificate of Service omitted.]

MEMORANDUM, OPINION AND ORDER

OF JUNE 2, 1986

[Located in Petition Appendix 83a]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of His Minor Child ROBERT ALEXANDER MUTH, Plaintiff : CIVIL ACTION

v.

MARGARET A. SMITH, et al, Defendants : No. 84-2032

DEFENDANT SECRETARY SMITH'S
TRIAL MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

By Memorandum and Order of March 18, 1985, this Court held that the Eleventh Amendment bars plaintiff's claim for retroactive monetary relief against defendant Secretary of Education[1]

---

[1]Secretary Robert C. Wilburn, sued only in his official capacity, was the original named defendant; he was succeeded by Secretary Margaret A. Smith who, as of August 1, 1986 has been succeeded by Acting Secretary D. Kay Wright.

and left open the question of whether injunctive relief would be appropriate.

Plaintiff was subsequently permitted to file a second amended Complaint in which he was, by Memorandum Opinion of November 18, 1985, permitted to raise two issues against the Secretary of Education: (1) whether the Secretary of Education's involvement in the due process hearings violates plaintiff's due process rights under the Education for All Handicapped Children Act [EHA] 20 U.S.C. §1401 et seq.; and (2) whether the delays in the due process procedure violate plaintiff's rights under the EHA. The Court did not permit plaintiff's claims as based on the Fourteenth Amendment and expressly precluded a claim which sought tuition reimbursement from the State.

By Memorandum Opinion and Order of June 2, 1986, the Court held that Pennsylvania's administrative procedures contravene federal law. The court did not resolve the issue of tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff with an appropriate free education.

The Court has invited further briefing from the Commonwealth on whether the Eleventh Amendment presents a bar to money damages against the Secretary of Education.

II. ARGUMENT

JURISDICTION OVER THE SECRETARY OF EDUCATION IS BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The United States Supreme Court has consistently interpreted the Eleventh Amendment to preclude suits against a state in federal court, by citizens of that state or other states. Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142 (1985); Pennhurst State School and Hospital v. Halderman, ____ U.S. _____, _____, 104 S. Ct. 900, 906 (1984); Edelman v. Jordan, 415 U.S. 651, 662-663, 94 S. Ct. 1347, 1355 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S. Ct. 1614 (1973); Parden v. Terminal R. Co., 377 U.S. 184, 84 S. Ct. 1207 (1964);

Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman, supra, as well as suits seeking equitable relief, Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057 (1978).

A state may consent to suit against it in federal court, but Pennsylvania has not done so. In Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981), the United States Court of Appeals stated that pursuant to 42 Pa. C.S. §8521(b) "Pennsylvania has specifically withheld consent." In absence of consent, a suit against the state or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 104 S. Ct. at 908.

The Eleventh Amendment is a complete bar to suit against the Commonwealth of Pennsylvania officials who are sued, as here, in their official capacities.

In Brandon v. Holt, 469____ , 105 S. Ct. 873, 878 (1983), the Supreme Court distinguished suits against governmental officials in their official capacity. The Court referred to Monell v. New York City Department of Social Services, 436 U.S. 658, 690, n. 55, 98 S. Ct. 2018, 2035, n. 55 (1978):

> [O]fficial capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.

When the state receives notice and an opportunity to respond, as in this case, an official capacity suit is, in all respects, to be treated as a suit against the state and any recovery of damages is against the state itself.

Kentucky v. Graham, _____ U.S. _____, 105 S. Ct. 3099, 3105 (1985).

The Supreme Court, however, has recognized that a suit challenging the constitutionality of a state official's action is not an action against the State. Ex Parte Young, 209 U.S. 123 (1908). Although the Supreme Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 104 S. Ct. 900 at n. 13,[2] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, supra 415 U.S. at 666-667.

---

[2]Edelman v. Jordan, supra, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

Applying these principles to this case, it is clear that the Eleventh Amendment bars this suit against the Secretary of Education.

Plaintiffs state that the Secretary of Education is being sued in his official capacity only. (Complaint, Para. 5a). Clearly the plaintiffs are looking to the Commonwealth and not the Secretary personally for payment of damages. Thus, the real party in interest is not the Secretary but the Commonwealth of Pennsylvania, and the Eleventh Amendment bars the award of any money damages against the Commonwealth. See Hark v. School District of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980).

Plaintiffs are relying on the argument that Congress abrogated the Commonwealth's Eleventh Amendment

immunity by passing the EHA pursuant to §5 of the Fourteenth Amendment.

While plaintiff is correct in pointing out the Congress may, by legislating to enforce constitutional provisions, abrogate the states' Eleventh Amendment immunity from suits for damages, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96S. Ct. 2666, 2671 (1976); Parden v. Terminal Railway, 377 U.S. 184, 192, 84 S. Ct. 1207, 1212 (1964), there must be unequivocal evidence of such abrogation before it can be assumed to exist. The Supreme Court has generally required such congressional intent to be either explicit in the statute or plainly evident from legislative history. Quern v. Jordan, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147 (1979). In Quern, the Court re-affirmed its holding in Edelman,

supra, p. 3, that the Civil Rights Act of 1871, 42 U.S.C. §1983 et seq., does not abrogate the States' Eleventh Amendment immunity and stated:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive providence of the individual states.
>
> [N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.
>
> . . .
>
> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the

> 42nd Congress believed that §1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act, along with the other evils that they thought would result from the Act. Instead, §1 passed only with limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting §1. We can only conclude that silence on the matter is itself a significant indication of the legislative intent of §1.

at p. 342-343.

Plaintiff's contention that in enacting the EHA, Congress abrogated the states' constitutionally granted immunity must satisfy stringent criteria recently re-affirmed by the Court in Atascadero State Hospital v. Scanlon, supra, p. 3. There, the Supreme Court refused to find such abrogation of immunity in

Congressional passage of the Rehabilitation Act, 29 U.S.C. §794 by stating:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory languages. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. [cites omitted]. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute.

at 105 S. Ct. 3147

. . .

> Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance

> between the States and Federal Government does not obtain. "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts." [cite omitted] In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

at 105S. Ct. 3148.

What plaintiff's argument overlooks is that simply because Congress has the power, in legislating pursuant to the Fourteenth Amendment, to override Eleventh Amendment immunity, it does not mean that it exercised such power in

enacting EHA. In fact, all indications are to the contrary: there is no reference either in the language of the statute itself or in the legislative history that Congress intended this statute to abrogate rights reserved to the States by another constitutional amendment.

Plaintiff relies on David D. v. Darmouth School Committee, 775 F.2d 411 (1st Cir. 1985) where the Court held that EHA effectively abrogates the sovereign immunity of states. There, the appellate court acknowledged its obligation to follow the principles enunciated by the Supreme Court in Atascadero that "congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." and found the requisite clarity in the following statutory provision:

> It is in the national interest that the Federal Government assist the State and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

[emphasis in original]. 775 F.2d at 421.

It is on this premise, that the statute is intended to assure the equal protection of the law, that this appellate court bases its decision to strip the states of a fundamental, constitutionally protected prerogative. Defendant suggests that such a holding, while paying lip service to the teachings of the Supreme Court, has blithely ignored them. In dissenting from his colleagues, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 10 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court...

775 F.2d at 425.

Defendants urge the Court here to adopt, instead, the more reasoned holding of the Eighth Circuit in Miener v.State of Missouri, 673 F.2d 969 (8th Cir. 1982) where the Court rejected the contention that the passage of the EHA abrogates states' immunity.

Relying on the clear guidelines laid down in Quern v. Jordan, supra, this Court held that an intention to sweep

away the immunity of states cannot be inferred from the mere fact that the Education Act was passed pursuant to the Fourteenth Amendment but that such an intent must be found in express, formal abrogation language or persuasive legislative history. In Miener the Court went on to dismiss all causes of action for damage relief against state officials, including relief in the form of compensatory educational services.

Plaintiff also relies on Department of Education State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983) where the court held that the state waived its Eleventh Amendment immunity (1) by participating in a federally funded and regulated program and (2) because it is amenable to suit

by the terms of §1415(e)(2).[3]

Simply because the EHA authorizes suit in federal court, it does not follow that suit may be brought against a state and its agencies in federal court. While a state may consent to a suit in federal court, "the state's consent must be unequivocally expressed." Pennhurst State School and Hospital, supra. A state does not waive its immunity to suit in federal court by mere participation in a federal funding

---

[3]Section 1415(e)(2) of the EHA states:

> [a]ny party aggrieved by the findings and decisions made under subsection (b) (providing for administrative review) ... shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States...

program. Atascadero, supra, at 105 S.Ct. 3150; Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147, 150 (1981). Rather, waiver will be found "only where stated by the most express language or by such overwhelming implications from the test as (will) leave no room for any other reasonable construction." Edelman v. Jordan, supra, 415 U.S. at 673.

CONCLUSION

Because the language of the EHA does not expressly say that states or their agencies can be sued in federal court at all, let alone for damages, Pennsylvania did not waive its Eleventh Amendment immunity. Accord Miener v. State of Missouri, supra, 673 F.2d at 981.

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

/S/ Maria Parisi Vickers
SENIOR DEPUTY ATTORNEY GENERAL

Andrew S. Gordon
CHIEF DEPUTY ATTORNEY GENERAL
CHIEF, LITIGATION SECTION

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 560-2402

[Certificate of Service omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

CENTRAL BUCKS SCHOOL DISTRICT
and
DR. THOMAS L. NEWMAN Superintendent of the Central Bucks School District : No. 84-2032

Trial Transcript of August 11, 1986

P. 6, l. 1 to p. 7, l. 19

MS. SOMMER: Would Your Honor like an opening statement?

THE COURT: If you wish.

MS. SOMMER: Your Honor, this case involves a program in placement for a learning disabled child, Alexander Muth. Alexander first entered the school, the Central Bucks School

District, approximately 1980. He had spent the first years of his education in South America, in Colombia, South America, where most of his education was conducted in Spanish. Prior to entering the Central Bucks School District, Alex was tested by Doctor Thomas Atkins, and at that time a learning disability was diagnosed by Doctor Atkins. When Alex entered the Central Bucks School District, he was placed in a learning disabilities classroom. He attended this classroom until September of 1983.

By way of background, Your Honor, in March of 1983, it was -- a multi-disciplinary team meeting was held. At that time it was decided that because of some concerns Alexander had about not feeling normal and because of some of the progress that he had made, it was recommended that a mainstreaming

program be instituted for two major subjects, that being English and science. Alex was mainstreamed into those two subjects in March of 1983. It was done on a diagnostic basis, and as a result, in June of 1983 another multi-disciplinary team meeting was convened with the parent to evaluate Alex's progress in the program. At that time, the Central Bucks School District multi-disciplinary team recommended that Alex's mainstreaming in those two major subjects be discontinued and that he be placed in a self-contained learning disabilities classroom for his eighth grade year, which would have been the 1983-84 school year.

Immediately after the June meeting, a due process hearing was requested and it was -- it is that process that began the reason we're here today. Because

the due process procedures were ongoing, no Individualized Educational Program plan was developed in June of 1983 for Alex. A program for the 1983-84 school year was developed after the Secretary of Education instructed the Central Bucks School District to begin preparing an IEP, and that IEP was prepared in March of 1984, and some revisions were made in April of 1984 after a meeting with Mr. Muth.

The Central Bucks School District will present to the Court the reasons that we believe the IEP that we prepared for the 1983-84 school year is appropriate.

P. 11, l. 24 to p. 17, l. 21

BY MS. SOMMER:

Q. Mr. Talerico, when did you first become involved with Alexander Muth?

A. I believe it was in November of 1982.

Q. And how was it that you became involved?

A. Alex was having some difficulties in the other resource room classroom, as well as feelings of being stigmatized by being in that self-contained resource -- classroom.

Q. When you talk about a self-contained classroom, to what are you referring?

A. Alex was in one classroom for the major subject areas of English language arts, math, science, social studies and reading, and he only left that classroom for electives.

Q. Was that a learning disabilities classroom?

A. Yes, it was.

Q. When you mentioned that Alexander felt he was being stigmatized, in what way?

A. He wished to participate more in the mainstream of Lenape Junior High School. He wanted to be in other classes, core classes with the students.

Q. Was there a multi-disciplinary team meeting held to discuss the possibility of mainstreaming Alex in March of 1983?

A. Yes, there was.

Q. Can you tell the Court what a multi-disciplinary team is?

A. At that meeting, there was a psychologist, the educational evaluator of the school district, the guidance counselor, the two special education teachers, and the principal, as well as the supervisor of Special Education and the director of Pupil Personnel Services at Central Bucks.

Q. Had most of these people been involved with Alex during the school year.

A. Yes, they had. Yes.

Q. What was the purpose of the multi-disciplinary team meeting?

A. It was to decide on a course of action so that Alex could be -- his program could be changed, so that he could be more into the mainstream of Lenape Junior High School.

Q. Was Mr. Muth present at that meeting?

A. I believe he was.

Q. Was a decision made regarding mainstreaming Alex from March of '83 to the end of '83 -- of the '82-83 school year?

A. Yes. We decided on a trial period where Alex would be mainstreamed in English and in science, would attend those regular mainstream classes. At that time he would also come to my room for reading and math, and I believe there were two additional support periods added to that schedule that he would come to my room for support.

Q. Was the mainstreaming program instituted?

A. Yes, it was. It was done on a trial basis from March until June.

Q. During the time period from March until June, did you have the opportunity to work with Alex?

A. Yes, I did.

Q. And did you have the opportunity to monitor his progress in the mainstreamed classrooms?

A. Yes. I had sometimes daily or weekly meetings with his mainstream teachers.

Q. Can you describe the -- how the mainstream program worked for Alex?

A. Initially Alex was motivated in the classroom, and for the first week, I think, maybe the first two weeks things went very well. But then the demands of the mainstream classroom, the structure of the mainstream classroom, he had trouble working in the environment. He was getting behind in assignments.

I'm not sure if at this time he was experiencing the frequency of absences that he had during the school year, but he was getting behind in work. He was getting frustrated. There were some disruptive comments, et cetera, made in the classroom. He had to be reprimanded. And there was overall conflict was developing between himself and some students, as well as the teachers.

Q. As a result of the trial period of mainstreaming, in June of 1983 was another multi-disciplinary team meeting convened to discuss Alexander?

A. Yes, it was.

Q. Do you know who was present at that meeting?

A. I believe the same people who were present at the previous meeting that was held in March, and we had some written reports from the mainstream classroom teachers.

Q. Were recommendations made to the parent at that time regarding Alex's program for the upcoming '83-84 school year?

A. Yes. Given Alex's difficulty in the mainstream classroom, we recommended that Alex be returned to the resource room program for science and English, and that way he would then be working with myself and the other special education teacher the following year.

Q. At the time of the June conference, was an IEP developed for Alex?

A. No, it wasn't. We had decided that we would develop the IEP in September when school was about to reconvene.

Q. Did Alex ever attend your class in the '83-84 school year?

A. No, he did not.

Q. Is it fair to say then in September of 1983, you did not have the opportunity to prepare an IEP for the '83-84 school year for Alex.

a. No.

Q. Did you have the opportunity at some later time to prepare an IEP for Alex?

A. Yes. In I believe it was February of '84, we prepared an initial IEP, an then revised it I believe it was April of that year.

Q. I show you a document that has been already admitted into evidence as Central Bucks 12. Can you identify this document?

A. Yes.

Q. What is it?

A. It's the IEP that was developed by myself and Miss Tolson, the Central Bucks education evaluator.

Q. Now, Mr. Talerico, what was the proposal for the 1983-84 school year in terms of placement?

A. In terms of placement, Alex would be in the resource room program. He would not be in the mainstream.

Q. When you talk about a resource room, what are you -- to what are you referring?

A. Well, it is a classroom for children with learning disabilities. In the resource room program, the student had the ability to move between the two different learning disability classrooms. There are some self-contained students and they still do move. The resource room program follows the IEP in trying to develop an educational program for a child in that placement.

Q. For the 1983-84 school year, how many learning disabilities teachers were there?

A. There were two at Lenape Junior High School.

Q. And approximately how many students would have been in the eighth grade learning disabilities classroom?

A. I believe somewhere between five and -- between any other class

period, there could be anywhere between five and ten.

Q. In addition to the two teachers for learning disabilities program, were there any other support personnel?

A. Yes. In each learning disabilities classroom, there are two educational aides.

Q. And with regard to your aide, how long had your aide been with you?

A. I believe my aide had been with me at least three years at that time, but I can't recall for sure.

Q. What is the purpose of a teacher's aide?

A. Well, in a classroom with children with learning disabilities, there are times, many times during the day when -- in a class period when support is needed, when I may be working with a group of students and there are

other students who need help with their particular assignments, and the aide can offer that assistance.

Q. Now, for the 1983-84 school year, would Alex be mainstreamed in any subjects?

A. No, none of the core subjects. Again, he would go out for his electives.

Q. And what electives would they be?

A. For a student there could be physical education, art, music, home economics, shop.

P. 23, l. 9 to P. 23, l. 22

Q. In the IEP that was prepared in March of 1984, is there a section for creative development?

A. Yes, there is.

Q. And how did you propose to address Alex's creativity?

A. Well, in the two areas, one would be problem solving, you could use current events in that area to develop ideas on nuclear energy and other particular problems of the day. And the other one was brainstorming techniques. You know, here's a problem, you know, how can we solve it. Let's come up with some ideas.

Q. And why was this area of creative development included in the IEP?

A. I believe that Alex's score on an IQ test indicated he had the abilities for an area like this on the IEP.

P. 31, l. 2 to p. 37, l. 9

THE COURT: May I ask a question or two at this point?

BY THE COURT:

Q. We're concerned with the IEP for '83 and'84. It's not clear to me the set-up of the resource classrooms. Did Alex remain in the same room all day, did he move to other rooms, and when he was in a particular room, were there other students from other grades in those rooms?

A. Okay. For the '82-83 school year, Alex started out in a self-contained classroom where he basically stayed in that room for all of his major subject areas and only left that room for art, music, physical education.

Q. What grade was he in during that year?

A. That was the seventh grade.

Q. Seventh grade. Were there other grades in that classroom?

A. When he's in these self-contained classroom, there are eighth graders or ninth graders. Generally there -- in the self-contained classroom, there could be as many as two different grade levels in there at one time.

Q. And a total of how many students would be in that class?

A. Again, it could be as many as ten, maybe eleven.

Q. Ten or eleven students. And what about teacher aides present?

A. Again, there would be one teacher aide for a particular classroom.

Q. All right. Now, the plan for '83-84, what did the IEP call for there in respect to whether he would remain in

one resource classroom or whether he would ...

A. He would ...

Q. ... visit other resource classrooms, who would be in each of those rooms, where there other grades in each of those rooms, how many students roughly would be in each of those rooms and teachers aides? Could you -- would you help me on that?

A. Yeah. I'd like to go back. In the beginning of the '82 school year, '82-83 well, Alex was self-contained in that he had only one teacher for those subject areas. In the '83-84 he would have had myself and the other special education teacher for the major subject areas. We would have divided up. I believe for that year he would have had me for reading and math, and he would have had the other teacher for science, social studies and English. Also ...

Q. Now, you're talking about the IEP for '83-84?

A. Yes.

Q. He would have had two teachers?

A. Yes. He would have had another teacher -- he would have also had other teachers for physical education, home economics, art. Then getting back to the number of students depending on the subject area, it could range, you know, between five to eleven students. There would be other grade levels in there with Alex at times. To give you an example, I sometimes have a seventh grade science class in the room at the same time that I may be having a ninth grade social studies class. So there are times where there are other grade levels in there.

Q. Would there be two teachers

teaching in the same room simultaneously under those circumstances?

A. There would be myself and an aide, and there are divisors that we put up to not make it distractable for the two groups.

Q. Room separators so to speak?

A. Yes.

Q. Now, for the '83-84 IEP, would he stay in the same resource classroom or would he go to other resource classrooms for other subjects?

A. He would have gone between my resource classroom and the other resource classroom, the other special education teacher. So there would have been two rooms that he would have taken his major subjects in.

THE COURT: All right; thank you. Shall we have cross-examination.

MR. BOGIN: Yes, Your Honor. Is it all right if I use the lectern?

THE COURT: Yes.

MR. BOGIN: I'm used to cross-examining standing up.

CROSS-EXAMINATION

BY MR. BOGIN:

Q. Now, Mr. Talerico, you said that in your opinion Alex was dyslexic?

A. I believe that was the diagnosis that was given to us.

Q. And you defined that term as meaning problems with the use of language; right?

A. And reading, yes.

Q. Well, acquiring and using language; right?

A. Yes.

Q. And isn't it also correct that Alex had receptive expressive language problems?

A. I believe that's so.

Q. And would you tell the Court what expressive and receptive -- well, let's do it one at a time. What's expressive language?

A. The ability to put his thoughts into words.

Q. And that -- and one can be expressive either orally or on paper?

A. On paper, yes.

Q. And tell the Court what receptive language is.

A. The ability to read and understand information, take in.

Q. Well, it's not only reading information. It's hearing information; isn't that right?

A. Yes.

Q. So it's the ability to understand spoken language; right?

A. Yes.

Q. And Alex had disabilities in both the expressive and the receptive channels; right?

A. I believe he did.

Q. Well, do you know?

A. I don't recall at this time, but ...

Q. You taught him; isn't that right?

A. Yes, I did.

Q. But you don't recall whether he had both expressive and receptive problems?

A. No, not at this time I don't.

Q. Now, I believe in your testimony you were telling the Court that you would have grouped Alex -- that there would have been six children in your resource room program who were on the same level as Alex; remember that testimony?

A. Yes.

Q. And by using the term on the same language, [sic] are you talking cognitively or performance?

A. The students who were in there, in that particular class period, some of them demonstrated the same difficulties that Alex was having as far as word attack skills, comprehension.

Q. Uh-huh. So there were having -- they were achieving on the same level; isn't that right?

A. Yes.

Q. Now, you're aware of Alex's cognitive skills?

A. Could you be more specific?

Q. Well, do you remember ever seeing some scores on a Wexler intelligence scale for children devised?

A. Yes.

Q. And do you remember what those scores were?

A. Offhand I don't.

Q. Do you remember that Alex had a 40 point discrepancy between his verbal ...

A. Oh, yes, I do recall that.

Q. Excuse me. We need to do it one at a time because we're recording.

A. Okay.

Q. Do you remember that Alex had a 40 point discrepancy between his verbal and performance scores on the Wexler?

A. Yes.

Q. And which was higher?

A. The performance.

Q. And his performance score was about 140; isn't that right?

A. I believe it was somewhere in that range.

Q. Which is about the 99.7 percentile; right?

A. Yes.

Q. And is it your testimony that these other six children had 40 point discrepancies between their verbal and achievement scores?

A. No, perhaps I was -- I didn't answer that other question appropriately.

Q. So they didn't have 40 point discrepancies; right?

A. No other student in there that I am aware of had a 40 point discrepancy.

Q. And there was no other student who had a 140 on one of the subtests either; isn't that right?

A. Not that I'm aware of.

P. 40., l. 10 to p. 41, l.20

Q. Now, I believe that on direct you told Miss Sommer - well, strike that. Miss Sommer asked you what the proposal was for the '83-84 school year,

and you gave her an answer about Alex being in the resource room and then getting mainstreaming for phys. ed., health, and -- remember that testimony?

A. Yes.

Q. Now, where was -- if you know, where was that proposal contained in writing, in the document that was sent to Mr. Muth?

A. Are you talking about the IEP?

Q. Well, I'm just asking where the proposal that you described for us orally is encompassed in writing?

A. Well, on the cover page of the IEP it mentions that Alex's primary assignment would be in the learning disabilities program and Alex will participate in art, music, physical education, health, shop and/or home economics.

Q. Okay. And the present date for that document is either April 25th, 1984 or March 28th, 1984 depending; right?

A. That's right.

Q. So when -- Alex was to begin the '83-84 school year I take it in September of 1983?

A. Yes. He would have been in there September of 1983.

Q. And this document was not done until the spring of 1984?

A. That's true.

Q. So was there anything in writing in September of 1983 to your knowledge that described to Mr. Muth the program that would be given to Alex?

A. Well, we had met the multi-disciplinary team meeting in June and the meeting was to reconvened in September to discuss that, and the meeting was never held.

Q. So the answer is no, there was nothing in writing?

A. Not that I'm aware of, although Mr. Muth may have had something in writing from the school district.

Q. And this IEP was not developed until the spring of '83 -- I'm sorry -- '84; right:

A. That's true.

P. 46, lines 6 - 15

ROBERT LAWS, DEFENDANT'S WITNESS SWORN

THE CLERK: Speak loud into the microphone. State and spell your name for the record.

DR. LAWS: My name is Robert Laws, L-A-W-S

DIRECT EXAMINATION

BY MISS SOMMER

Q. Dr. Laws, by whom are you employed?

A. Central Bucks School District.

Q. In what capacity?

A. I'm Director of Pupil Services.

P. 46, l. 25 to p. 47, l. 2

Q. Dr. Laws, were you involved in the due process proceeding with Alexander Muth -- involving Alexander Muth?

A. Yes, I was.

P. 47, l. 17 to p. 48, l. 12

Q. And what was your involvement?

A. There was a multi-disciplinary team meeting held sometime in late February or early March with Mr. Muth, wherein we discussed some difficulties Alexander was having in the resource room, and specifically a report from Elizabeth Fallon, who was the school psychologist at Lenape, and who was seeing Alexander that the time. Se commented that Alexander was expressing to her a good deal of frustration and disappointment that he wasn't able to be mainstreamed at all, and was commenting that he really needed something to make him feel normal. During that discussion with Mr. Muth and the team, we decided to try some mainstreaming with Alexander to see if that would help. At that

point the decision was to mainstream him for English and science, I believe.

Q. At the end of the school year, was another team meeting held to discuss and evaluate the mainstreaming?

A. Yes. The team reconvened in June of 1983 to evaluate the success or lack of success in that mainstreaming experience. At that time it was recommended that beginning with the 1983-84 school year, we felt that a full-time program would be more appropriate and that we should discontinue the mainstreaming.

P. 56, lines 1 to 2

CROSS-EXAMINATION

BY MR. BOGIN:

P. 57, l. 14 to P. 59, l. 8

Q. Now, you're familiar with the notices of recommended assignment, I believe, do you recall?

A. Yes.

Q. NORA, everyone refers to. Would you tell the Court first of all -- well, what is a NORA?

A. Well, NORA is the notice of recommended assignment, wherein a school district must issue that to a parent, making a recommendation for placement and an outline of the proposed program.

Q. And those are forms, aren't they?

A. Correct.

Q. Who produced those forms, the

local district or the state education agency?

A. Who reproduces them or ...

Q. Well, who developed the forms, if you know?

A. I believed it was developed in the Commonwealth of Pennsylvania out of the Park decision back in 1972.

Q. So it's a state -- it's a form supplied to you by the state; right?

A. Yes. In our case, we happen to get our forms from the local intermediate unit.

Q. But it's reasonably developed by the state?

A. Yes.

Q. Before school began in September of 1983, was a NORA sent to Mr. Muth concerning Alex's placement for the '83-84 school year?

A. No, I don't believe it was

because at that time we had already in June requested a due process hearing?

Q. Who had requested a due process hearing?

A. Mr. Muth ...

Q. And ...

A. ... through a letter to me following our June 17th meeting. He had sent a letter requesting a due process hearing.

Q. Uh-huh.

A. I then made those arrangements by phone through the Pennsylvania Department of Education.

Q. Uh-huh. And it's your position that once a due process hearing was requested, you had no more responsibilities in terms of providing Alex's program?

A. My position on that is, our district continues to have

responsibility to provide a program for Alexander. In the case of -- in this particular case, this youngster was removed from the school district, and it was then under the jurisdiction of the hearing officer as to how we would proceed from there.

P. 61, l. 21 to p. 64, l. 2

A. The purpose of that due process hearing was to, to use your words, convince that hearing officer that our program in Central Bucks was appropriate, considering the recommendation made for no further mainstreaming. You have to remember that that mainstreaming was done on a diagnostic basis to respond to the emotional state that Alexander was in at the time.

Q. There was no disagreement, was there, that the mainstreaming didn't work? That wasn't a dispute, was it?

A. That's correct, it was not a dispute.

Q. Mr. Muth didn't want more mainstreaming for Alex; right?

A. At that time. In March ...

Q. Yeah.

A. In March, he along with the team, wanted more mainstreaming.

Q. I understand. And that ...

A. In June we decided it was no longer appropriate.

Q. Yeah. It was an experiment from March to June ...

A. That's right.

Q. ... and all agreed that it failed?

A. That's right.

Q. And so that you went to that hearing in September to prove that the program at Lenape was appropriate to meet Alex's needs; right?

A. Correct.

Q. And the program that you attempted to prove to meet Alex's needs was the IEP that had been developed in March of '83; isn't't that right?

MS. SOMMER: Object; it's been asked and answered.

THE COURT: Overruled.

A. Well, that was one of the documents entered.

Q. That was the only IEP entered for '83-84; isn't that right?

A. Yes, it was.

Q. Now, is it your position that you needed Mr. Muth's permission to develop another IEP for '83-84 if you felt that the one that had been

developed in March was inappropriate to meet his needs?

A. Well, we viewed the parent as an integral part of that IEP planning meeting, and I believe federal law requires the parent to be present.

Q. So it's your testimony that in order to prepare a valid IEP for any school year, the school district needs the parent present; is that right?

A. Whenever possible we'd like to have the parent there, yes.

Q. Well, that's not the -- that's different than the answer you just gave me, isn't it? My question is, does the parent -- is it mandated that the parent be there?

A. If the parent does not show up for an IEP conference, the school district will go ahead and prepare a draft IEP and request parental review

and input. There are certain situations where we know parents cannot physically come to a conference.

Q. Uh-huh. And you're mandated to take certain provisions to ensure that they're either present or that the conference is brought to them; right?

A. It is our responsibility to provide and prepare an appropriate program for our exceptional children, yes.

P. 64, line 25 to P. 65, l.23

REDIRECT EXAMINATION

BY MS. SOMMER:

Q. Doctor Laws, at the due process hearing or September 30th, 1983, was there testimony regarding the inappropriateness of the March 1983 IEP?

A. Yes, there was.

Q. And was there testimony regarding what the District believed was an appropriate program for Alex for the '83-84 school year?

A. Yes, there was.

Q. And did you testify at that hearing about what was appropriate for Alex for the '83-84 school year?

A. Yes, I did.

Q. What did you testify to regarding the appropriate program to be presented by the Central Bucks School District for the '83-84 school year?

A. For the 1983-84 school year, we recommended that Alexander have all of his core academic subjects under the direction of a learning disability teacher. We have two learning disability teachers at Lenape Junior High and his time was to be divided

between those two learning disability teachers. Consistent with the least restrictive environment, Alexander would be mainstreamed for special subjects, art, music, phys. ed., home arts and practical arts.

P. 73., l. 2 to p. 75, l. 3

BY MS. SOMMER:

Q. Mr. Taylor, did you review the records of the Landmark School from September 1983 through June of 1985?

A. Yes. I did.

Q. And did you review the two IEPs from Landmark School for '83 through '85?

A. Yes, I did.

Q. Did you review the records from the Wyncote Academy from 1985 through June of 1986?

A. Yes, that is correct.

Q. Did you also review the report of Doctor Atkins, dated May of '85?

A. Yes, I did.

Q. Did you prepare an IEP for Alexander Muth for the 1986-87 school year?

A. Yes. I prepared a draft IEP in consultation with the diagnostic learning consultant that we have in the school district, who reviewed the information, especially the test information, with me, Mrs. Judy Tolson. She put together the present educational level statement, and then from there I drew up the specific goals and objectives that you see in the IEP in front of you.

Q. Do you have a copy of the Central Bucks 9, the IEP for the 1986 school year in front of you?

A. Yes, I do.

Q. Mr. Taylor, what is the first document contained in the proposal for 1986-87?

A. The first page is the notice of recommended assignment indicating that the Central Bucks School District recommends that Robert Muth, presently in Wyncote Academy, be placed in grade eleven, learning disabilities resource room, operated by Central Bucks East High School.

Q. And on the second page, what document is that?

A. The second page is the multi-disciplinary team report. What this is is once I had the opportunity to review the previous test materials and reports from Wyncote and Landmark, I then shared that information along with the IEP that's coming with the multi-disciplinary team at CB East High

School I wanted to be sure that we had a program that would be appropriate to meet Robert's needs at Central Bucks East High School. The participants of that meeting are identified at the bottom of the page; Jerry Stemplewicz, who is one of the learning disabilities teachers there, Kathy Regan, who is a certified school psychologist, James Gallagher, who is the building principal, myself, Judy Tolson, who is the diagnostic learning consultant I mentioned earlier, and also Doctor Robert Laws.

Q. And what was the recommendation of the multi-disciplinary team?

A. It was the concensus of the group based upon information that we had in front of us that the Central Bucks School District could offer an

appropriate program for Robert at Central Bucks East High School.

P. 80, l. 5. to p. 82, l. 17

Q. Can you describe the types of learning disabilities that are seen in the eleventh grade population at Central Bucks East?

A. The majority of the students who are learning disabled have their disability in the area of auditory skills, difficulty in retaining information that is presented to them auditorily.

Q. From your review of the records, is it your opinion that Alex has a similar problem?

A. Yes.

Q. Mr. Taylor, do you know what

the average IQ -- full scale IQ of the students in the regular education for the Central Bucks School District is?

MR. BOGIN: Objection. What's the relevance?

THE COURT: Is this relevant?

MS. SOMMER: Yes, Your Honor, only to show where Alex fits in terms of his IQ.

THE COURT: Overruled.

A. The average IQ of the student in the Central Bucks School District is 115.

Q. And do you know what Alex's full scale IQ is?

A. Yes, I do.

Q. What is that?

A. The performance IQ is 139, and the verbal IQ is 98, full scale of 120.

Q. Are there other learning disabled students in the program at

Central Bucks East High School with a discrepancy between their verbal and performance IQs?

A. Yes, there is.

Q. And are there any with similar discrepancies to Alex?

A. Yes. There are at least four or five students with similar discrepancies.

Q. When you're talking about a similar discrepancy, what kind of a discrepancy are you referring to.

A. I'm talking about at least a 20 point discrepancy between the verbal and performance IQ.

Q. Is it fair to say there are not students with a 40 point discrepancy?

A. None at Central Bucks East High School at this time in the eleventh grade.

Q. Now, I notice in the IEP form itself that the third page of that IEP is a document entitled, Placement Options. When you prepared the IEP, what other placement options, other than the program you've proposed, did you consider?

THE COURT: What exhibit is this?

MS. SOMMER: Your Honor, that's the proposal for '86-87, Central Bucks 9.

THE COURT: Thank you.

MS. SOMMER: Page three.

A. The process procedure that we use any time that a youngster moves into the Central Bucks School District and has been identified as a learning disabled youngster, outside or even inside of the school district that is returning, as part of the review process, we attempt to determine if in fact we have a program that is

appropriate. We take a look at all the options that we have, as we did in the case of Robert, and one of his options would be simply attendance in regular education. And we ruled that out as not being appropriate to meet all of his educational needs at this point in time. We also ruled out the option of private schooling. Once again, we didn't feel that private school would afford him the opportunities for mainstreaming and integration with regular education kids that attendance in a public school program would.

P. 93, l.25 to p. 95, l.16

Q. With regard to the word attack goal, where did you notice that Alex needed help developing decoding skills?

A. Throughout much of the education information that we have gathered on him, previous testing results, teacher comments on the records and so forth that we received from Landmark.

Q. Is it fair to say that while at the Central Bucks School District, Alex also had decoding problems?

A. Yes, that is true.

Q. And that decoding problem was evidenced in the Landmark records as well?

A. Yes, very much so.

Q. How did you propose to -- that Alex be taught to decode?

A. The system that we use in all of our programs, not just at the high school, is really pretty much dependent upon the student's needs as determined by the present educational levels. If a

student learns better auditorily, then we present that material to that youngster in that mode. In other words, if the student can sit in the classroom and gather information, retain information auditorily, then that's how we will present it to him. If the student learns better through the visual mode, then we'll present materials and teaching activities in that area to best teach the student. So it's really a number of different things. For Robert in this case, once again we went back to the records and so forth we had from Central Bucks and also from the Landmark School, and saw that they had done some things with regard to phonetic skills, linguistic skills, some language kinds of things, tried to use a number of different materials, tried to use specifically a VAKT kind of approach

with him, and it obviously was successful according to the pre- and post-test scores that we had on him, so we wanted to be able to duplicate that.

Q. The VAKT approach was the visual, auditory, kinesthetic and tactile approach that Mr. Talerico discussed earlier?

A. Yes, that is correct.

Q. Were many of these short term objectives adopted from the IEPs from the Landmark School?

A. Yes. They would simply be a continuation with the youngster. If he's working at a fifth grade level in reading, let's say, there are some skills that he has mastered and some that he has not mastered at this point in time, the IEPs indicated that and we would simply add to goals in a sequential kind of way.

P. 107, l. 24 to p. 108, l. 25

CROSS EXAMINATION

BY MR. BOGIN:

Q. Now, Mr. Taylor, just so I understand, CB-9, which is the NORA, the IEP and the results of the multi-disciplinary team report, is Central Bucks' proposal for the 1986-87 school year; is that right?

A. We have not met with the parent at this point in time, understanding that this is a draft. This is the draft that we would share with the parent pending the IEP conference.

Q. Well, let me ask you the question again. Is this Central Bucks' proposal for the 1986-87 school year or is it not?

A. It is a proposal.

Q. And if Alex were to attend -- strike that. If this Court were to order Alex to attend the Central Bucks School District for '86-87, CB-9 is what would contain his program; is that right?

A. With the parent input, yes.

Q. Now, you've had -- there has been no IEP meeting; isn't that right?

A. That is correct.

Q. There's been no notification to Mr. Muth of an IEP meeting isn't that right?

A. That is correct.

Q. This document has been developed without Mr. Muth's input; isn't that correct?

A. It is a draft.

Q. I beg your pardon?

A. It is a draft of the proposal as we have referred to it.

P. 113, l. 20 to p. 116, l. 10

Q. Now, you said that one of the -- used several foundations for the development of the IEP; isn't that right?

A. Yes, that's right.

Q. And one of them was IEPS that have been done by Landmark; right?

A. That is correct.

Q. And another one would have been the education records developed on Alex by Landmark; isn't that right?

A. That is right.

Q. So I take it that you consider what Landmark did to be appropriate with Alex?

A. Yes, we have no problem with it. In fact, we thought it was very appropriate.

Q. Uh-huh. And I take it you

consider what Landmark did with Alex to be successful?

A. Yes, it was successful as indicated by the test scores, pre and post.

Q. And based on what you know of Alex, as well as what you've seen in the records, I take it your opinion were that if he were to go back to Landmark, they would continue with the same program; right?

A. I would suspect they probably would

Q. And would it be ...

THE COURT: Well, that's seeking speculation from the witness. Go ahead.

Q. Now, you told Miss Sommer that the average verbal IQ in the learning disabilities classroom was in the 90s; is that right?

A. That is correct.

Q. How about the average performance IQ?

A. The average performance IQ would probably be in the low 100s to 110 range.

Q. And Alex is 139; isn't that right?

A. That is correct.

Q. Which is about a standard deviation and a half above average; right?

A. That's right.

Q. That's a highly significant difference; isn't it?

A. Yes, it is.

Q. And isn't it -- wouldn't you also agree that an accurate measure of Alex's intellectual potential is probably more closely to his performance IQ score than his his verbal IQ score?

A. Would you repeat that again please?

Q. I'll rephrase it for you. Would you agree that Alex's -- that measuring Alex's intellectual potential is difficult because of his learning disability?

A. Yes, it is.

Q. And that because he has a learning disability in the verbal areas, the core on his verbal portion of the Wexler is depressed from his actual ability?

A. That I couldn't say.

Q. And would you also agree that the performance measure on the Wexler more nearly approximates his intellectual capability than the verbal?

A. I couldn't say that either. I think I can say with regard to the disparity, I do recognize the fact that

it is significant, but the intent of the Individual Educational Program would be to look at that verbal score and provide an IEP accordingly, concentrating on those specific strengths and weaknesses that he has with that 98 verbal IQ, likewise taking a look at the verbal IQ -- or excuse me, the performance IQ of 139 and providing a program then that meets the needs of that particular score.

Q. Uh-huh. Within the constraints of what's going on in the Central Bucks School District; right?

A. Yes.

P. 116, l. 24 to P. 117, l.7

Q. Now, it's my understanding that the proposal for vocational -- for Alex going to the Vocational-Technical School

came from Doctor Atkins report; is that right?

A. Yes, that is correct.

Q. And if you'll bear with me for one second ...

A. And also I think there were some indicators of Landmark School, too, of some experiences there that he had -- that Robert had with some hands on kinds of things that he was interested in that, highly motivated and successful.

P. 128, l. 22 to P. 29, l. 5

BY MS. SOMMER:

Q. Do you recall in reviewing the Landmark records whether Alex had participated in a science project?

A. Yes, I believe he did.

Q. And do you recall whether he had been -- do you recall what that project was?

A. Not right this moment I don't, no. I seems to me that it was something that he was very interested in a and motivated about.

MS. SOMMER: I have no other questions.

P. 130, l. 25 to P. 131, l. 22

Robert Laws, Defendant's Witness Previously Sworn

DIRECT EXAMINATION

BY MS. SOMMER

Q. Did you form an opinion as to

whether or not the IEP proposed for the '86-87 school year was appropriate?

A. Yes, I did.

Q. And what is that opinion?

A. My opinion is that the program outlined in the 1986-87 proposed IEP for Alexander at Central Bucks East is appropriate.

Q. On what do you base that opinion?

A. That program was designed to maximize the strengths that we saw in Alexander's performance, to take into consideration what weaknesses he had, in an effort to construct a program that he would benefit from. It also enables him to have a program in a lesser restricting placement and one in which he would have contact with non-handicapped peers.

Q. Is it your opinion that this less restrictive placement is important for Alex?

A. Yes, it is.

Q. And on what do you base that opinion?

A. From my knowledge of Alexander through the records that I have reviewed, while he does have a significant learning disability, he also needs to have contact with regular education peers so that he can take advantage of opportunities in a regular high school program.

Q. Have you reviewed the testing results from Landmark Academy and Wyncote Academy?

A. Yes, I have.

P. 136, l. 26 to P. 137, l. 25

Q. Now, did you do any -- did you draw any conclusions from the test results that you reviewed from Alex's three years out of the school district?

A. Well, essentially my conclusions were that -- yes, I did draw some conclusions. Essentially they were that Alexander seemed to make progress at Landmark in very much a similar pattern that we noticed while he was in Central Bucks.

Q. When reviewing the Landmark records, did you notice in the reports from the different teachers whether Alex was having difficulties adjusting to the program?

A. The reports that I reviewed from Landmark indicated a fine adjustment during the 1983-84 school

year, and for at least the first half of the 1984-85 school year. From about January of 1984, however, the reports start to indicate that Alexander was beginning to have some difficulty, particularly in the area of receiving constructive criticism around projects or assignments. It also indicated that assignments were not being turned in regularly. It made a reference to attendance, that he wasn't attending classes frequently. And many of the reports toward the end of the 1984-85 school year were indicating that -- from the teachers that they felt Alexander could be making better progress, but thinks he was not adjusting at that point.

Q. Was Alex withdrawn from the Central Bucks -- from the Landmark School in March of 1985?

A. Yes, I believe he was.

P. 139, l. 11 to P. 140, l.19

Q. Doctor Laws, do you have an opinion as to the importance of mainstreaming Alex in regular education classrooms?

A. Despite the fact that Alexander has a significant learning disability, I believe that it's vitally important for him to have contact with regular education peers. I believe it's important for him to be in a home environment, to live in a neighborhood, and to go to school with kids in the neighborhood so that he can take part in extra-curricular activities. It's my opinion that no matter how learning disabled a youngster is that youngster

can still take part in activities and non-academic courses with non-handicapped peers.

Q. When Alex was in the Central Bucks School District, was it determined that he had some emotional problems?

A. We felt that there was some emotional interference in Alexander's learning.

Q. And what -- was there any conclusions drawn as to part of the reasons for this emotional interference?

A. I think the conclusions or the origin of some of those emotional difficulties is still a mystery to many of us. However, we felt that reports from Alexander were indicating that he very much wanted to be associated with what he referred to as a normal kids, which is one of the reasons we tried the mainstreaming experience. We also felt

that and had recommended that Alexander and his father become involved in counseling.

Q. What was the reason for the recommendation?

A. Well, we felt that the relationship between Alexander and his father needed some help in developing a better system of communication.

Q. Where is the Landmark School located?

A. Landmark School is located in Prides Crossing, Massachusetts.

Q. And Alexander would be living in a school environment as opposed to a home environment?

A. He would be living in a dormitory, yes.

P. 144, l. 17 to P. 146, l. 7

CROSS EXAMINATION

BY MR. BOGIN:

Q. Now, you said you had concerns about Alex's emotional state if he went to Landmark; is that right?

A. If he was in residence, yes.

Q. Well, he can't hardly go to Landmark if he doesn't reside there; can he?

MS. SOMMER: I object.

THE COURT: Sustained. That's not a helpful comment. Shall we continue? Ask questions.

Q. Is it true that you have concerns about Alex's emotional state if he were to go to Landmark?

A. Yes.

Q. And you are aware that Doctor Adamson has been seeing him for -- since 1983; isn't that right?

A. Yes.

Q. And you are also aware that Doctor Adamson is recommending that Alex go to Landmark; isn't'that right?

A. Yes.

Q. And Doctor Adamson is a psychiatrist who's been working with Alex; isn't that right?

A. Yes.

Q. Did you ever attempt to discuss your concerns about Alex's emotional state with Doctor Adamson?

A. No, I did not.

Q. Now, I believe you also said that in your opinion it's never appropriate to put a child in a full time special education -- a learning

disabled child in a full time special education program; is that right?

A. I'm not sure I used the word never, but certainly generally speaking it is my philosophy that youngsters should be mainstreamed whenever possible, wherever possible.

Q. Well, when you mean possible, do you mean in terms of logistics or in terms of appropriateness.

A. In terms of appropriateness.

Q. And you also understand that Alex is going to be mainstreamed approximately half the time if he were to go to Central Bucks; is that right?

A. Well, out of the nine periods a day, I believe the IEP shows five academic subjects where he would be in the learning disability classroom. One of those nine periods is lunch, so he would have an opportunity to be

mainstreamed for about three periods a day.

P. 148, l. 2 to P. 155, l. 7

WILLIAM C. ADAMSON, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Speak loud into the microphone. State and spell your name for the record.

DR. ADAMSON: I'm William C. Adamson, M.D.

THE COURT: How do you spell your last name?

DR. ADAMSON: A-D-A-M-S-O-N

DIRECT EXAMINATION

BY MR. BOGIN:

Q. Would you give us briefly your educational and professional background?

A. I'm a graduate of Swarthmore College, University of Pennsylvania Medical School. I specialized in psychiatry and neurology through training at the Delaware State School Hospital for one year and one year at the Institute of Pennsylvania Hospital, two years of special training at the Philadelphia Child Guidance Clinic under Doctor Frederick Allen, after which I became director of the Austin Community Guidance Center in Austin, Texas where I worked with the courts and with the school system as director of Community Guidance Center. Then the director of Professional Services at the Woods Schools for exceptional children in Langhorne, Pennsylvania, where I worked with the directors of Education Recreation. Then proceeded to the Pathway School in Jeffersonville,

Pennsylvania, which is a school for boys and girls who have learning disabilities, both day and residential. Proceeded as a staff psychiatrist at the Pathway School. Became clinical director of services from 1968 to 1978, and then director of Medical Psychiatric Services at the Pathway School. I'm also clinical professor of child and adolescent psychiatry at Hahnemann University, and a charter member of the Multi-Disciplinary academy for Clinical Education. I've authored the book -- handbook for specific learning disabilities with my wife, Katherine K. Adamson, published by Gardner Press in 1979.

Q. And are you board certified?

A. I'm board certified in both adult psychiatry and neurology and in

child psychiatry, a sub-specialty of psychiatry and neurology.

Q. Are you familiar with Alexander Muth?

A. Yes. I have been working with Alexander Muth ...

THE COURT: Just a moment. Is there any cross-examination of qualifications?

MS. SOMMER: No, sir.

THE COURT: All right.

A. I've been working with Alexander Muth and his father from the spring of 1983 to the present.

Q. And you had the opportunity to evaluate him in the spring of 1983; is that correct?

A. Yes, I did.

Q. Well, could you tell the Court what the results of your evaluation were?

A. Yes. The evaluation proceeded first of all by getting a very careful

medical history, reviewing all of the records that were available at that time, particularly the neurological records, the records from Doctor Atkins, and records from the Bucks County public school system. I then evaluated Alex in my own office and at that time determined that there are several major problems which he did in fact show. These problems were centered first of all on his major difficulty in word recognition, in spelling, and in a sample of handwriting which is referred to in my report, psychiatric evaluation of April and May 1983. The handwriting and the word expression, the written expression at that time was of such a low level it appeared to be really that of a youngster perhaps at the third grade level where he was still using manuscript rather than cursive writing.

He also had difficulties in the reading fluency area and comprehension was adequate. The other studies indicated that he had what we refer to as a very low self esteem, a hurt pride. And so in essense there were three things that came to be present. First of all, a neurologic impairment, or chronic brain syndrome as it's been called in the past; secondly, a major severe language learning disability, manifested by dyslexia, by very grave problems in written expression and by difficulty in terms of oral expression. The third area of problem was what I referred to as the hurt pride, or the low self-esteem, and this was manifested in the drawings which he did and in the ways he viewed himself as a person, essentially as a person who is failing. It carried with it a lot of anger, a lot

of fear of criticism, a lot of struggles really just to find himself as a person.

Q. And from the spring of 1983 to the present, have you continued to work with Alex?

A. Yes, I have. I've continued to see Alex over a period of time, usually at times of the vacations from Landmark, but also more recently when he's been a student of Wyncote Academy, and then as recently as this past week. About fifteen visits in all.

Q. Now, did you notice any changes when Alex was at Landmark?

A. Yes. There is a very frightening and dramatic change that I noticed on October 20th, 1984, and with Your Honor's permission, I'd like to show this to you because you couldn't see it in the report, but this is right

out of the file, his file, and I'd like to show you a written sample ...

THE COURT: Why don't you simply answer questions. If your lawyer wants me to see something, he will handle that.

MR. BOGIN: Well ...

THE COURT: Is this an exhibit? Is this a document that Miss Sommer has seen?

MR. BOGIN: Well, I'm going to take a look ...

THE COURT: All right.

BY MR. BOGIN:

Q. Well, describe for us while we're looking at this document ...

A. All right.

Q. ... the changes that you saw.

A. All right. Whereas in the 1984 sample of handwriting he used manuscript with spelling errors, with the inability really to make a complete sentence in

answer to the question, why I'd like to be an astronaut, he was able in this paragraph to write cursively, to put sentences together with proper syntax, semantics, with very positive morphology of the words, and a beautiful expression of exactly the feelings that he was trying to get across that he had not been able to express in a written way prior to that Landmark experience.

Q. And did you consider that a significant change?

A. That's a very dramatic change.

Q. Why?

A. He essentially moved from a young man who was unable to express himself in a written form to a young man who was able to express himself cognitly, clearly, and practically up to age appropriate level.

Q. Now, did you notice any other changes when he was at Landmark?

A. There were changes that indicated that he had made some improvement in the reading areas. The specific one had to do with a greater fluency with word analysis and the capability of taking a word and breaking it down and being able to move ahead without pausing or without feeling failure or turning away to avoid the reading. The other thing that was apparent was that he seemed to be happy there. He felt that he was making progress, that he was with a peer group that understood him.

Q. Now, when you saw Alex for the first time in the spring of 1983, did you make any recommendations about the sort of schooling he ought to have?

A. Yes, I did.

Q. And please tell ...

A. I indicated in the last paragraph of the report ...

THE COURT: Is there a report ...

MR. BOGIN: Your Honor, that was ...

THE COURT: Is there a report this witness has rendered? Do I have a copy of it?

MR. BOGIN: Yes, Your Honor. That was admitted in the first due process hearing, the September 30 due process hearing, as exhibit P-2, and that is CB-1.

THE COURT: All right.

A. The recommendation reads, "In view of the degree of language functioning problems, it is strongly recommended that Alex attend the Landmark School in Prides Crossing, Massachusetts. The program is designed to help young people of promise to

realize their full language and its potential, and therefore, especially intensive in programming on other mastering of skills of reading, writing, spelling and composition. All of these areas are areas in which Alex is extremely weak." The second recommendation was that Alex and father have ongoing counseling in order to improve the quality of communication, that this should be done prior to Alex's leaving for Landmark School and on the occasions of his returning for vacations.

Q. Now, when you made that recommendation after evaluating Alex, did you have any question about the affect of his going to Landmark on his emotional status?

A. I felt that he needed to have a positive learning experience. It was clear that he had had many years of

failure and that he was continuing to feel that he was failing in the school experience. In order to raise his self-esteem, in order to give him a feeling of pride and accomplishment, it was important for him to have a successful learning experience, and I felt that he'd have a better opportunity at the Landmark program than any other program of which I was familiar.

Q. Did you think that it might engender any feelings of rejection on his part?

A. I felt that Alex was really asking for an opportunity to prove himself both to his father as well as to himself, and I felt that the important thing was a schooling program that would allow him to do that, and therefore that the residential aspect of it would not interfere, but would rather give him the

opportunity if it was the kind of program we were looking for, would give him the opportunity to find himself as a person.

P. 171, l. 1 to P. 172, l. 19

A. I feel that this effort is premature, and I feel that it is picked up Doctor Atkins' impressions that a vocational program should be instituted at this time, and I feel that for that reason this IEP represents a watered down program for Alex Muth. It's too soon in his particular development to bring in this kind of vocational piece and to minimize the need for continuing emphasis on the specific language learning disability. There is not, in my opinion, adequate team supervisory

coverage. Alex is a young man who does require a total team effort, and I don't see in this particular report any indication that there's going to be supervisory team coverage. It does not seem to me that it covers really a program specific enough. It's vague, and particularly the section where it talks about individual tutoring on that "as needed" basis, I think is very clear that it doesn't come in and hit hard on the areas where we know Alex Muth needs specific help. I just feel that the other thing that's missing, and I feel this very strongly, the thing that's missing in this IEP is the importance of creating a learning climate, a climate that allows for motivation, for desire, for success, and there's nothing in this IEP really that speaks to the importance of creating a positive learning climate

for Alex Muth. It seems to me that this IEP could have been written for any student anywhere, a language disabled student or teenager, and it's just not a specific IEP for a young man with a severe language learning disability that still persists. There's still residuals of that language learning disability.

Q. Now, Doctor, are you familiar with the program that Alex received at the Landmark School?

A. Yes, I am.

Q. And are you able to give us an opinion as to whether or not it would be appropriate for Alex to return there for the '86-87 school year?

A. I feel it would be very appropriate for him to return to that program.

Q. And why is that?

A. Well, I think first of all, the

language problems are still there. The residuals are still there. He's only 16, and from our knowledge of brain development, his brain will continue to grow and mature until he hits the age of 19 or 20. So he still has at least three more years in which to master his learning and to achieve in the language level. Secondly, he's indicated that he does have the desire to return, in his words, to get back on the track and to try to make a go of it.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH : CIVIL ACTION

v.

CENTRAL BUCKS SCHOOL DISTRICT
and
DR. THOMAS L. NEWMAN Superintendent of the Central Bucks School District : No. 84-2032

TRIAL TRANSCRIPT OF AUGUST 12, 1988

P. 3, l. 4 to p. 5, l. 17

THE COURT: Shall we continue?

MR. BOGIN: Yes, Your Honor. Doctor Adamson was on the stand.

(Pause)

THE COURT: Mr. Bogin?

DIRECT EXAMINATION

BY MR. BOGIN:

Q. Doctor, one of the problem areas that you told us about yesterday was Alex's low self-esteem; do you remember that?

A. Yes.

Q. Can you give us an opinion as to the affect on Alex's self-esteem of the proposal by the Central Bucks School District.

A. In my opinion, Alex's self-esteem would be lowered by the program that's been outlined by Lower Bucks on these four counts. First of all, it would not offer him the opportunity for success, and he's had repeated failures which leads to low self-esteem. He would not be offered the opportunity for a one-to-one tutorial which we've stressed is

important. He wouldn't be offered the opportunity for an appropriate peer group. Alex happens to be a highly intelligent boy with a major severe language disability, and he expressed to me that one of the reasons why he had difficulty in Bucks County in his earlier '83 program was because "those guys aren't going anywhere, they don't feel like they want to go anywhere, and I want to go someplace in my life." So I feel that the peer group is very important. Thirdly, that particular IEP does not provide for an intensive, well-structured study hall program to reinforce the skills that have been learned in the classroom. And so he doesn't have the opportunity to really prove to himself that he can do it, that he can be successful. And in my

testimony yesterday I indicated that this was one of his very, very real fears that he would fail in front of the group. And finally, I do not feel that the Bucks County '86-76 IEP provides a total learning climate appropriate to a young man with this severe dyslexia, with the severe language learning disability which he currently has.

Q. Now, Doctor, are you able to give us an opinion as to the affect on Alex's self-esteem of a return to Landmark?

A. It is my clinical opinion that the program at Landmark School would be a major step toward the enhancement of his self-esteem for the following reasons. First of all, it does provide a one-to-one intensive tutorial, the kind we described he needs. Secondly, it provides a peer group of adolescents his

own age, and I understand from materials that I've read from Landmark that as many as fifteen percent, 15, fifteen percent of the teenagers there do have the severe language disability of the kind that Alex is currently struggling with. Thirdly, it does provide an organized intensive structured study hall experience every day in which the proctors are also the teachers from the classroom, and so there's a sense of continuity from classroom to study hall which allows him, if he makes a mistake, it allows him to have immediate correction on the spot, that allows him to feel good that he's mastered that, that allows him then not to experience the failure, that allows him then to raise his self-esteem and come back in a classroom the next day ready to learn.

And so the bottom line from me is that the Landmark School as I've come to know it, through the reports that I've received, through Alex's sharing with me and the material that's come in from the Landmark IEP does provide -- does provide a total learning climate for a teenage with a severe language learning disability.

P. 8, l.21, to P. 9, l. 5

CROSS EXAMINATION

BY MS. SOMMER:

Q. When you first began seeing Alex, Mr. Muth told you that he wanted your input about Alex's program of education; isn't that correct?

A. I'm just looking to see specifically what the -- what I list as the chief complaints and the chief concerns, and he had -- this is his chief concern. He was concerned about his son's lack of learning, his son's lack of mastery of reading, and the fact that he seemed to be very upset in his school placement.

TRIAL EXHIBITS

SCHOOL DISTRICT
Exhibit 7

2744

Student's Name: Alexander Muth

Birth Date: 3/11/1970

Present Date: 9/30/80

Grade/Program: LD-RR Mainstream: Combination 4-5

Teacher(s): P. Krauss

District/School: Cardinal Creek / Kutz Elementary School

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
LD Resource Room	9-30-80	9-29-81	
Speech	9-31-81	9-29-81	

Extent to which the child will participate in regular education: Mainstream for: Art - Physical Ed (lunch + recess) 5th grade
Music - Library - 4th grade

Services:

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	Chuck Neill Sp. / Sp. Ed.
Parent, Guardian or Surrogate Parent:	Patricia L. Krauss (Teacher) (parent)
Teachers(s):	F. H. Muth (primary)
	M. Ferree
	Principal X Muth Jr. Parent X

Date for review and/or revision of the Individualized Education Program Plan: February 1981

Person responsible for the supervision of the IEP: Mr. Chuck Neill

[redacted]

SCHOOL DISTRICT
Exhibit 12

PSYCHOLOGICAL CONSULTATION

NAME: R. Alexander Muth

Birthdate: 3-11-70

School & Grade: Kutz LD (5)

Date of Consultation: 3-13-81

Reason for Referral: Alexander arrived in the Central Bucks District in September, 1980. His previous school attendance had been in Texas and Columbia, S.A. where he had lived with his mother. Parents are divorced and Alex did not see his father during this approximate 3 1/2 year period. His primary language while living in S.A. was Spanish, although he has readapted well to the use of English and now speaks without an accent.

Alex was evaluated by a psychologist at the Abington Friends School in June, 1980 preparatory to possible enrollment

there. He was given a more intensive evaluation in August, 1980 by Dr. Thomas Atkins, psychologist. Reports of both these examinations are in his files and should be consulted for particulars. Generally speaking, however, a significant difference was observed between Verbal and Performance IQ's on the WISC-R, accompanied by deflated academic accomplishment for his age and grade. A language disorder was diagnosed and an educational placement which "will provide an extensive remedial speech and language experience" was recommended.

Alex was enrolled in the Kutz Learning Disabilities Resource Program in September, 1980. He has been mainstreamed with the fourth grade for music and library and with the fifth grade for lunch, art and gym. Teachers

indicate that he has been making appropriate academic progress and social adjustment.

Mr. Muth has expressed repeated concern to Alex's LD teacher and the school principal about Alex's alleged problems in adjusting to the LD class. Ostensibly he has felt embarrassed by his teacher in front of others and generally uncomfortable with interactions within that room. Mr. Muth felt that a personality conflict may exist between Alex and his teacher which is precluding a positive school experience for the boy.

Tests Administered:

Wide Range Achievement Test

House-Tree-Person Test

Sentence Completion Test

Rorschach

Interview

Behavioral Observations and Test Results: Alex was a quiet, soft-spoken, attractive young man who was spontaneous and open in discussing his life experiences and concerns. A predominant theme during discussion and projective techniques involved his discomfort with being in a Special Education class, inquiry regarding how long he would have to remain in this environment and confusion about why he was there in the first place. Many of these questions were resolved in his mind by focusing on his LD teacher, thereby associating her personally with the cause and promulgation of what he perceives to be a denegrating and embarrassing educational milieu. He did not present any concrete situations in which his teacher treated him unfairly or otherwise embarrassed and humiliated

him. His comments about his interactions with her were essentially positive in this area. However, he did say that two other boys would be going back to the regular classroom next year and he couldn't join them "because the teacher won't let me," as well as similar statements which suggest that he blames the teacher for his educational placement.

Alex claims that he has lost potential friends because of his placement, as the other children tend to call him "retarded." An undercurrent of loneliness and insecurity permeated Alex's responses and conversation. Considerable confusion seemed to be extant regarding the stability of his current living environment, whether his father will "send him away" as he sees his mother as having done and whether he

will eventually be "adopted" because his parents can't afford to keep him. These concerns seem to be intimately interwoven with a negative sense of self regard and its cutward manifestation of being placed in a Special Education Program. He sees himself as a flawed child whose faults are the basis of major difficulties in his life and their remediation his prime concern at the present time.

Results of the Wide Range Achievement Test can be compared to the scores from this test obtained in August, 1980:

		Grade	Standard Score
8/80	Reading	2.0	62
	Spelling	1.9	62
	Arithmetic	3.5	86
3/81	Reading	3.2	79
	Spelling	2.4	62
	Arithmetic	4.1	82

Alex used a phonics approach to Spelling and Reading and his ability to associate sound and symbol was greatly improved over testing in August, 1980. He continued to reverse "b' and "d" and did not spontaneously correct this, although he did indicate that he thought they were wrong as written. He made the corrections only after specific encouragement to do so.

Alex also experienced considerable difficulty with auditory discrimination. He confused and substituted like-sounding words during test administration and interview.

Recommendations and Parent Conference:
Insights reviewed in this report were discussed in conference with Mr. Muth. The following recommendations for Alex appear to be appropriate at this time:

1. Continuation in his present academic setting.

2. Instigation of periodic sessions with the school guidance counselor who can, in turn, discuss concerns and difficulties with Mr. Muth (and vice versa) as they may arise.

3. Clarification to Alex of questions which he may have regarding his educational experience, as well as realistic possibilities regarding future living arrangements. Efforts should be made to reassure Alex in the areas of continued support, acceptance and affection on the part of significant others, as well as his own value and high esteem.

4. Alex's progress should be monitored and, if problems continue, he should be referred for additional suggestions.

/S/ Elizabeth Fallon
Certified School Psychologist

SCHOOL DISTRICT
EXHIBIT 14

Psychological Report

Report on Alexander Muth

School Kutz

Parents' Name Mr. Russell Muth

Grade 6 LD

Address 66 Springs Drive

Birthdate 3-11-70

Telephone 348-3014 (Work) 622-2665

Date of Evaluation 2-25-82

Reason for Referral To determine appropriate academic placement for next year.

TEST USED	DATE	RESULTS
Bender Gestalt Test		
Visual Aural Digit Span Test		
Wide Range Achievement Test		
Sentence Completion Test		
Rorschach		

WECHSLER INTELLIGENCE SCALE FOR CHILDREN-REVISED

Verbal Tests	Scaled Score	Test Age
Information	8	
Similarities	13	
Arithmetic	12	
Vocabulary	8	
Comprehension	8	
(Digit Span)	10	
Verbal IQ:	98	

Performance Tests	Scaled Score	Test Age
Picture Completion	17	
Picture Arrangement	15	
Block Design	14	
Object Assembly	19	
Coding	13	
(Mazes)		
Performance IQ:	139	
Full Scale IQ:	120	

COMMENTS: Alex has been enrolled in the Learning Disabilities Program for his fifth and sixth grade school years. He arrived in Central Bucks from out of state in September, 1980. Reports of previous psychological evaluations are in his file and should be consulted for results as well as for background information.

Mainstreaming had been effected for two major subjects but recent problems necessitated a return to the LD Program on a full time basis. Teachers report that Alex has expressed reluctance to perform in class and that he has been experiencing difficulty in keeping pace with scholastic activities in regular education. Reevaluation was requested in order to plan an appropriate academic program for Alex at the junior high level.

TEST RESULTS; WISC-R - Results indicate that Alex is currently functioning within the Average to Very Superior range of intellectual development. Verbal ability lagged significantly behind that of Performance although no subtest scaled scores fell below the low average category.

...

CONCLUSIONS and RECOMMENDATIONS: Alex appears to be a young man whose current intellectual functioning ranges between average and very superior. A significant gap exists between Verbal and Performance ability as measured by the WISC-R, and Alex's language disability continues to impede his academic progress.

In addition, projective techniques reveal a young man with a diminished self esteem as well as some depressive qualities. The Sentence Completion indicated that Alex feels that he "doesn't have any friends," and wonders why "some people hate me." In addition, other children "are smarter than me," and he wishes he were "in total regular class." He went on to say that he thinks he is best "at nothing," and things would be better if "I had a whole new life."

Test results were discussed in a Child Study Team meeting and, subsequently, in conference with Mr. Muth. The possibility of including Alex in the LD Program at Lenape Junior High was reviewed. Also under consideration was placement in a private

school for Learning Disabled youngsters such as the Valley Day School.

In addition, involvement in a professional counseling milieu in order to help Alex deal more effectively with apparent conflicts is strongly recommended.

Mr. Muth indicated that he would contact Mr. Lange, Director of Special Education, in order to further explore the two educational placements discussed and, subsequently, a decision regarding next year's program planning would be made.

Elizabeth Fallon
Certified School
Psychologist

EF:ff

SCHOOL DISTRICT
EXHIBIT 9

Student's Name: Alex Muth

Birth Date: 3-11-70

Present Date: 3-16-82

Grade/Program: Gr. 6 LD

Teacher(s): Marybeth Tilghman

District/School: Central Bucks/ Kurtz

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
LD Resource Room			

Extent to which the child will participate in regular education: Alex attends physical education, art and music and library in regular education.

Services:

Language			
Bus Transportation			

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	[illegible]
Parent, Guardian or Surrogate Parent:	
Teachers(s):	M. Tilghman

Date for review and/or revision of the Individualized Education Program Plan: February, 1983

Person responsible for the supervision of the IEP: Charles Neill, Supervisor of Special Education

[redacted]

SCHOOL DISTRICT
EXHIBIT 10

EDUCATIONAL EVALUATION BY CENTRAL BUCKS SCHOOL DISTRICT, MARCH 2, 1983 -- examiner: Judith Tolson

BUCKS COUNTY INTERMEDIATE UNIT #22
EDUCATIONAL EVALUATION

NAME:	Alexander Muth
BIRTHDATE:	3/11/70
C.A.	12-11
SCHOOL	Lenape Jr. High
TEACHER	
GRADE	7/R.R
DISTRICT	Central Bucks
EXAMINER	Judith Tolson
DATE TESTED	3/2/83
REFERRED BY	Elizabeth Fallon

REASON FOR REFERRAL

Alex was referred for an evaluation to establish present educational levels and to aid in determining an appropriate academic program.

SUMMARY OF INFORMATION

Alex was administered a WISC-R by Mrs. Fallon, school psychologist, on 2/25/82. The results of this test reveal that Alex's abiliteis fall within the superior range of intellectual functioning. There was a large discrepancy between the verbal and

performance sections of this test. Alex has been in a class for learning disabled children since soon after entering the Central Bucks School District.

OBSERVABLE BEHAVIOR

Alex was brought to the testing session by his guidance counselor, Mr. Wagner. He initially attended well to all tasks presented but as the testing session progressed, Alex became more withdrawn and finally put his head down on the table and refused to work. With a great deal of encouragement, Alex was able to complete most of the items presented. Although he did verbalize spontaneously on occasions, for the most part, Alex was extremely quiet. When engaged in conversation with the

examiner, he spoke openly about school and his desire to be placed in the "team" for instruction in various subjects.

...

SUMMARY

Alex is a twelve year, eleven month old boy who scores within the superior range of intellectual functioning. However, there appears to be a severe discrepancy between his ability and his academic achievement. Alex needed a great deal of encouragement to complete the tasks presented and toward the end of the testing session gave up totally.

Academically, Alex is instructional at the 3^{2} grade level in reading. He has specific difficulties with word analysis skills and a limited sight vocabulary. Arithmetic appears to be his greatest strength and he is functioning approximately at the 5^{9}

grade level. Spelling skills are extremely weak and will require a great deal of remediation.

In conclusion, because of Alex's behavior during the test experience, all test results may not be a true measure of his academic ability.

SUGGESTIONS

Reading

Alex needs to develop a larger sight vocabulary which could best be done through wide reading.

While Alex has not made appreciable academic gains in reading the results of the listening comprehension list indicates that he is capable of understanding the content of age and/or grade level written material. Based on his lack of progress the use of auditory

techniques in conjunction with visual tactile material are recommended.

Supplementary Materials

-Lessons and Vowel Consolant Sounds Curriculum Assoc.

-Reading Skill Practice Kid)

-Word Analysis Cards) Curriculum

-Spelling Word Finder) Associates

JT/bcm
cc Richard Coe
Dr. Robert Laws
Charles Neill
Mr. Russell Muth
Elizabeth Fallon
Judith Tolson

SCHOOL DISTRICT
EXHIBITS 1, 2, 4

Student's Name: R. Alexander Muth
Grade/Program: 7th Regular Education (Team) / Resource R
Birth Date: 3-11-70
Teacher(s): Vincent Talerico
Present Date: 3-11-83
District/School: Central Bucks / Lenape

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
7th grade team	3-14		
Resource Room	3-14		

Extent to which the child will participate in regular education: Alex will take English and Science with the 7th grade team and will attend the Resource Room For Reading and Math

Services:

Speech	3-14		

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	David Spencer
Parent, Guardian or Surrogate Parent:	Russell Muth
Teachers(s):	Vincent J. Talerico
	Charles Neill

Date for review and/or revision of the Individualized Education Program Plan: 3-84

Person responsible for the supervision of the IEP: Charles Neill

206

SD-1

(NOTICE OF RECOMMENDED ASSIGNMENT)

Mr. Russell Mutta, Jr. 3/11/83
(Date)

66 Springs Drive

Doylestown, PA 18901
Name, Address of Parent

Dear Mr. Mutta

The Central Bucks school district recommends that Alex Mutta presently in
(name of student)

LD Programs be placed/continued in LD programs
(present educational assignment) (recommended assignment)

operated by Central Bucks in Lenape Jr. High
(operating agency) (location)

As you are aware, an individualized education program has been developed; a copy is attached. (A student who is no longer in need of special education will not have an IEP).

Before this recommendation is implemented, you have the right to further discussion with school officials and the right to a hearing before a designee of the State Secretary of Education. Attached is an outline of your rights concerning the educational program.

If you approve the recommendation, please indicate this by signing below; then return a copy of this page. Keep a copy for your records.

If you do not approve, please indicate this by signing below and listing the reasons; then return a copy of this page.

Please respond within 5 days if this was given to you in person, or within 10 days if you received this by mail. If you do not respond within the stated time, it will indicate that you approve the recommendation, and the program will be implemented.

Thomas A. Shuman
(signature, School District Superintendent)

For further information contact: _____

Return this to: _____

✓ I approve this recommendation and do not wish to request a pre-hearing conference or a hearing.

___ I do not approve this recommendation. I request a pre-hearing conference. My reasons for not approving are: _____

_____

_____

_____

3-11-83
(Date)

Russell Mutta Jr.
(Signature of Parent/Parents)

Copy to: Sp. Ed. Office, Student's File, Sp. Ed. Teacher, Parent

Name R Alexander Math

Instructional Area: Reading

Present Date 3-11-83

Annual Goal: To improve the level of Alex's reading skills

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Alex will reproduce the vowel sounds as presented by a modified linguistic vowel circle Alex will letter decode simple to complex syllable words	Auditory Discrimination in Depth	teacher made tests	85% accuracy

Name R Alexander-Moth

Present Date 3-11-83

Instructional Area: Reading

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Alex will divide 3 or more syllable words into their syllable parts.	teacher made	teacher made	85% accuracy
Given a list of words, Alex will identify prefixes and/or suffixes present in the word	materials	tests	

Instructional Area: Reading

Annual Goal:

Name R Alexander Moth

Present Date 3-11-83

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Given a short reading selection, Alex will verify factual information, recognize meanings in context, understand modifications, recognize cause and effect, and make inferences.	Reading for Concepts New Practice Readers Readers Digest Skill Builders	Grading of Daily Assignments	85% accuracy

Name R Alexander Mth

Present Date 3 - 83

Instructional Area: Mathematics

Annual Goal: To Improve the level of Alex's Math Skills

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Alex will review for the purpose of reinforcement the four basic operations (+, -, x, ÷) involving whole numbers.	Growth IN Mathematics	Unit or Chapter tests	85% accuracy
Given a decimal fraction, Alex will correctly read such	Spectrum Series	teacher made tests	
	teacher made materials		

Instructional Area: Mathematics

Name R Alexander Math

Present Date 3-83

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Alex will learn the four place values of decimal numbers. Tenths, Hundredths, Thousandths, Ten Thousandths.	Growth in Mathematics	Unit or Chapter tests	85% accuracy
Given a decimal number, Alex will match it to a fraction of the same and read said number.	Houghton Mifflin Individualized Mathematics Program	Grading of Individualized assignments	

Instructional Area: Mathematics

Annual Goal:

Name _____

Present Date _____

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Given a decimal number Abf will write the words for the number and reverse the process after instruction in the four basic operations (+, −, ×, ÷) involving whole numbers & decimal numbers. Abf will compute such	S.R.A. Materials Learning System Cross Number Puzzles	Grading of Daily assignments	85% accuracy

111-4

515

Instructional Area: Mathematics

Name _____

Present Date _____

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
After instruction, Aby will correctly compute problems using +, −, ×, ÷ on decimal numbers Aby will be presented a divided figure, partially shaded, 1) to a given fraction 2) orally tell what portion of the figure is shaded	as previously indicated	as previously indicated	as previously indicated

SCHOOL DISTRICT
EXHIBIT 3

Alex Muth - Program Planning/IEP Conference of 3/11/83

The following persons were in attendance: B. Fallon, R. Wagner, J. Tolson, V. Talerico, R. Laws and Mr. Muth.

In response to Mr. Muth's concern that Alex was not receiving appropriate programming, a conference was held and the following adaptions made:

1. Alex was removed from the LD class for part of the day.

2. Contact with Miss Rozsa was removed entirely.

3. Alex was placed in two team classes, English and science.

4. Team teachers were briefed regarding background from Mrs. Fallon.

5. All LD support will come from Mr. Talerico.

6. Alex will receive reading, math and study/support in the LD class.

A specific schedule was developed in which classes were alternated between "rest" periods or easier classes. Mr. Talerico or his aide will support Alex in the English and science class.

This placement was made as a result of Alex's current depressed emotional state. This was emphasized to Mr. Muth that this kind of a placement was diagnostic at best and would be reviewed periodically. We reiterated to Mr. Muth the need for this child to feel some degree of normalacy [sic].

Monitoring of Alex's program will occur in the following ways.

1. Mrs. Fallon will continue to see Alex on a weekly basis to discuss his feelings.

2. Periodic educational reviews will occur at six-week intervals. These will be accomplished by the following persons: Judy Tolson, Chuch Neill, Vince Talerico. The entire team would reassemble in May to review Alex's program for the 1983-84 school year.

NRL:ff
3/17/83
cc: C. Neill
J. Tolson
B. Fallon
D. Spencer
R. Wagner
V. Talerico

CENTRAL BUCKS
EXHIBIT 13

PSYCHIATRIC EVALUATION

NAME: Robert Alexander Muth

DATE OF EVALUATION: 4/30, 5/7, 5/14/1983

AGE: 13 yrs., 2 mos. (d.o.b. 3/11/70)

I. PURPOSE OF EVALUATION

Mr. Russel Muth, Alex Muth's father, expressed concern about his son who is in the seventh grade at Lenape Junior High School. He was aware that his son has been described as "performing in an inconsistent manner and that frequent absences contributed to the inconsistent performance." Few assignments had been turned as a result of the absences, and Alex had refused assistance from teachers and teacher aide. Also, the teachers recognized that he was able to contribute in class and described his strengths as being in the verbal areas.

The school also expressed concern to the father that Alex "might be using his learning disability as an excuse for not making an effort, even with considerable one-to-one support." It was felt that there might be emotional problems in Alex's life which were "exacerbating his learning difficulties, that there were emotional blockages with teachers such that he perceives some of them picking on him, and that he was not functioning well in this situation."

The school had also recommended that a psychiatric evaluation be done, and suggested the consulting psychiatrist to the Central Bucks School in Pennsylvania as a possible resource for this evaluation.

Mr. Muth elected to seek his own child psychiatrist and sought advice from this clinician.

II. BACKGROUND INFORMATION

Past Medical History. Mr. Muth stated that he was married in August, 1969. He recalled that his wife had a benign pregnancy, she was approximately 30 years of age. There was no known exposure to drugs or toxins. She was full-term at the time of delivery. He recalls that there was not "sufficient contractions and there was some consideration of Caesarian section for what appeared to be a placenta praevia. The mother was given Pitocin and delivery occurred with 24 hours after the rupture of the membranes. There was evidently a nuchal cord around the neck three times, and some question of a rapid delivery, though 24 hours would not be considered rapid. This was the first and only pregnancy of the mother.

The baby was born with no apparent congenital abnormalities or birth marks of any sort.

According to Mr. Muth, the first year was uneventful, and all milestones, including acquisition of language, were said to be on schedule.

Mr. Muth indicated that his wife was from Columbia, South America, that there had been considerable storm and stress in the marriage, and at one point he had sought out psychiatric counseling.

In 1976 his wife indicated dissatisfaction with the marriage, she became ill with a reported abdominal mass. She elected to go to her family in South America, left the home without telling Mr. Muth, and took her son with her.

In talking about the early years of child rearing, Mr. Muth said that his wife had a dual personality. She had good maternal instincts, and nursed Alex up until he was 3-1/2 years of age. On the other hand, she was very "hyper" in the discipline area. Was short-tempered, often paddled him with her shoe, and was very severe with him. He noted, "She always had plenty of money for nail polish but not money for her son when she was taking care of him in South America."

Apparently Alex lived with his mother who resided with her family from may, 1976 to December, 1979, when she returned to the United States and lived in the Houston area. Father then went to get Alex and brought him to Philadelphia in March 1980.

After the summer of 1980, Mr. Muth was to send Alex to visit his mother in Houston. When the mother called and there was some question as to whether she might be taking Alex to Bogata with her, Mr. Muth refused to send him to Houston as he did not want to risk having the child taken back to South America. He elected to keep him here, went through legal custody procedure. When his mother told Alex that his father had "fixed it so he couldn't see her until he was in his twenties" the young man became depressed, his school work took a nosedive, until the summer of 1982. It was during that summer of 1982 that Mr. Russel Bishop, of the Abington Friends School Summer Camp Program, advised that Alex should be allowed to see his mother. After two

weeks of visiting with her he "was unhappy there and came home." Mr. Muth says his mother continues to call and keep in touch with him.

Past School History. Alex went to nursery school and kindergarten in the Philadelphia area, where no difficulties were noted. The parents then separated and his mother took him to Columbia, South America where he was placed in a Spanish-speaking school for the equivalent of first, second and third grade. Mr. Muth was not aware of any problem there.

In 1979 his mother returned to Houston, Texas, where Alex would have come into the middle of the fourth grade, but he was placed in the third grade because of his reading difficulties, for which he was given some remedial help.

In the summer of 1980, after securing legal custody of Alex, the young child, then 10 years of age, was placed in the summer program of the Abington Friends School, psychological testing was carried out at that time, which showed a marked discrepancy between his verbal and performance abilities with the additional conclusion that he had a learning disability, evidence of mixed cerebral dominance, and considerable left-right confusion.

In the summer of 1981, Alex was again placed in the Abington Friends School Summer Program, and it was noted that in comparison to the previous summer his peer relationships had improved markedly. His circle of friends expanded, and he was respected by the group.

Of great concern to the staff was what was reported as "evidence of a poor or insecure self-concept." He seemed to have unreasonably high expectations of himself, was his worst critic if he failed at something, and was apt to withdraw or to express anger (often at himself) in certain explosive ways. Nevertheless, there was considerable maturing noted in this regard, also, over his behavior patterns of the previous summer.

Alex indicates that things during the first year with his father seemed to be adequate, but following the summer of 1981 and going into 1982, "Things started going down the drain. Dad wouldn't listen. I would get in trouble trying to bargain with him to get what I wanted. We don't talk that much together now."

Past Psychological Testing. The initial testing in the United States was done through the Abington Friends School in June, 1980. It indicated a Wechsler Full-Scale I.Q. of 90, Verbal I.Q. of 72, and Performance Scale I.Q. of 114. The depressed Verbal Scale scores were thought largely, but not entirely, attributable to language differences. However, he had scored low on arithmetic, digit span, and coding subtests.

In July, 1980, he was seen by Dr. Thomas E. Akins, at the University of Pennsylvania. Dr. Akins identified the difficulty he had in identifying right and left sides of his body, his body parts, and in responding to simple requests. He noted the mixed dominance, and the problems Alex was having in speech and language usage including

fragmented, poor grammar and syntax. At that time the Weschsler Intelligence Scale for Children-Revised showed Full-Scale I.Q. of 92, Verbal Scale I.Q. 75, Performance I.Q. 115. He noted that the subtests reflecting acquired information were far below what one would expect of a boy who was so observant and alert, even given the questionable fact of bilingualism. All subtests involving sequential thinking, attention, short-term memory were significantly poor. It was Dr. Akins impression that his problems "are not simply a matter of expressive verbal fluency or accuracy or verbal learning skills, as he performs within the normal range on specific measures in these areas. There seems no reason to suspect that primary emotional disorder, nor cultural shock, nor bilingual problems

are a satisfactory explanation for his limited academic skills, nor for his general pattern of test performance." Dr. Akins suggested that a pediatric neurological evaluation was an important next step in an effort to clarify the problem.

Alex was seen by Dr. Samuel Tucker, pediatric neurologist, in the winter of 1980. At that time he noted that Alex was showing a severe language-based learning disability, for which historically there was no clear-cut explanation, though he leaned "toward the view that these were probably more likely to be genetically based than to be based on simple maturational lag or on the basis of an underlying brain dysfunction." An EEG carried out in conjunction with that evaluation was a normal waking record. The possibility

of doing a CAT-Skan for ruling out a neurological condition was decided against, and Dr. Tucker's observation was that it did appear to be a significant learning problem, possibly on a genetically determined basis.

The next psycological study was done February 25, 1982 by the Central Bucks School District, Elizabeth Fallo, Certified school psychologist. In that study of the Wechsler Intelligence Scale for Children-Revised, Verbal IQ 98, Performance IQ 139, Full-Scale IQ 120. Psychologist noted he had been enrolled in a learning disabilities program for his fifth and sixth grades in school. Mainstreaming had been effected in two major subjects, but recent problems necessitated his return to the LD program on a full-time basis. On the Wide-Range Aptitude Tests at that time

reading, 3.8, spelling 2.5, math 4.1. It was hoted that Alex continued to show significant lag in scholastic achievement, letter reversals, and diminished self-esteem with some depressive qualities. On this basis consideration of his placement in a private school for learning disabled children such as the Valley Day School was made. Professional counseling was also suggested to help him deal with the apparent conflicts with which he was struggling.

The most recent educational evaluation was completed on March 2, 1983 by Judith Tolson. In this evaluation he initially did well, however, as the testing session progressed, he became more withdrawn, and finally put his head down on the table and refused to work.

Results of the Standard Achievement Tests indicated reading 4.9, math 6.4, written language 3.9. In reading orally he could only read to the third level, had difficulty reading fourth grade, and could not comprehend the material when he read it himself. However, when the examiner read to him, he was able to comprehend the story detail through the sixth grade level.

In spelling he earned a total grade score of 3.3 He appeared to use revisualization of words to aid him in spelling. However, his phonics were quite weak. In the written expression he "gave up during this exercise, would not produce a sample that could be used as a valid measure of his ability."

The conclusion of this educational evaluator, Judith Tolson, was that there appears "to be a severe discrepancy between his ability which is at the superior range of intellectual functioning and his academic achievement. Academically, he is instructional at a third grade level in reading, has specific difficulties with word analysis and a limited sight vocabulary. Arithmetic function was at the fifth level. Spelling skills were weak and written expression extremely low." No statement was made as to recognizing the degree of the learning disability present in this performance.

III. DISCUSSION OF CURRENT PSYCHIATRIC EVALUATION

Behavioral Observations. Alex is a good-looking boy. He is generally open and direct. He tended to blame happenings on others, though he admitted that he could act out in school to get his own way. Much of his current conflict he put on his father, particularly over a hassle which they had had in regard to purchasing a dirt bike. Alex had asked for a smaller 80 CC bike, but his father reasoned that he would soon outgrow that particular model and bought a much larger 100 CC model for him. The father said, "I think he should be grateful, and I can't perceive why he has this much

anger at me for buying the bigger bike." From the son's point of view, the father had not listened to him, had put him on a bigger bike which he could not manage, and had put him into several life-threatening situations because of his inability to handle the bigger bike. "I just couldn't ride that fast on that bike and keep it under control. I am mad because he didn't listen to me when I told him what I thought I could handle." (This kind of incident seems to point up some of the problems in the communication between the father and son. The father wants to be an effective father, and in some ways puts a higher expectation on the son than the son can achieve. At the same time, he has a hard time listening to what the

son feels he can handle. The son, on the other hand, feels that the father is totally out of touch with him and that they are like two ships passing in the night, in the fact that they have little communication between them.)

Response to Bender-Gestalt Visual Motor Test. Alex was able to complete all of the Bender-Gestalt Visual Motor figures quite well. There was no indication of problems in angulation or simplification which would suggest a visual-motor process problem. The one striking feature of his response was the fact that the figures were made on a very small scale. It was as though they were constricted in an effort to control and contain the underlying emotionality. They were done in good order and sequence, appeared neatly

finished on the page, and done with considerable accuracy. The overall quality of the drawing reflected superior mental functioning.

Response to House-Tree-Person Drawings. The house was done rather skillfully. However, it is significant that the house takes on a somewhat bare, bleak appearance. Also, there is no baseline or ground line to the house, which you would usually see in children 8 or 9 years of age or older. Both the absence of a ground line and the bleakness and barreness would tend to point up conflictual feelings he has about his mother, his father, and his living situation past and present.

His story about the house was as follows: "It is an old house, ready to be destroyed. It is very old. Some old

people are trying to keep it together. (How does the story end?) That the people save the house." (The symbolism in this story would seem to reflect that Alex is concerned about the relationship he is having in his home, and some of the feelings that destruction is possible. He apparently sees efforts being made by the "old people", which would include his father and this clinician, as trying to keep things together. He has a positive outcome to his story.)

Alex's drawing of a tree is quite good. The symbolism is clear and the quality shows artistic perceptiveness. However, once again, a ground line is absent and the tree is drawn as if it is suspended in the air. One could only surmise that this is reflective of some

of the disturbances in his early beginnings and that he still has basic insecurities with which he's struggling.

His story of the tree was as follows: "It is an old tree in a big field. Nobody has seen it before except one person. (Who was that?) Me. Nobody's ever going to see it again. (How does your story end?) Noone sees it. It is at the end of the world and the tree will be blown up when the world blows up."

(This story is in marked contrast to the quality of the tree. The tree is actually beautifully placed on the page and well done. The story is an ominous one, suggesting great inner conflict and confusion. It also suggests that Alex can be a secretive person, keeping things strongly inside himself. The

symbolism of the tree is representative of both maternal and paternal issues, and the story suggest that no one truly sees his parents as he sees them. The ending of the story is disturbing in that it implies that the parents will never truly get together in a parenting role for him and that there can only be some kind of end of the world destruction in relationship to his ties to them. On the basis of these observations, as well as the social history, it would appear that therapy and individual counseling would be important to help him find alternative ways of viewing his life situation.)

Alex's drawing of a person is also reflective of some of his inner struggles. The drawing stands about two inches high. It appears that the little boy is wearing a cap which is pulled

down over his left eye so that it's difficult to see clearly his facial expression and his feelings. Alex identified the figure as that of a boy, 8 years of age, who was happy because he "was living with his parents." The body image as it is drawn is intact, though he has shown just three fingers on his left and right hand instead of the usual number. Also, there is a slight distortion in the head size, such that the head appears to be large and out of proportion in relationship to the rest of the body. This is sometimes seen as the subject's preoccupation with things related to the brain, to learning, and to emotions which are seated within the brain function.

Response to Reading. When asked to read material at a third to fourth grade level, significantly below the seventh

to eighth level where he is seated, Alex did show work recognition problems. He miscalled several words but could correct his mistakes. Often in his reading he would have one word running off into the next word. Word recognition became increasingly difficult above the third to fourth level, and he was not able to comprehend and understand when he read silently to himself. When read to Alex was able to comprehend up to a sixth year level and above. Alex had difficulty in his spelling of more complex words. Some of the mistakes which he made pointed up phonetic spelling but difficulty in visual recall of these words: family was spelled famili; language spelled langue; elephant was spelled elefent; tongue was spelled tonge; afternoon was

spelled afternon (with one o); troubled was spelled trobled; and vegetable was spelled vegetudel.

Response to Writing Sample. It was in this area of written expression that Alex had his greatest difficulty. Earlier, when I had asked him about what he would like to be when he grew up, he had indicated he'd like to be in the Air Force, and he had wanted to be an astronaut since he was 8 years of age. I then asked him to write a few sentences for me on "Why I would like to be an astronaut." Alex wrote the following sentence: "It would be exiding exprioinsin." He was clearly upset at his inability to write out what he wanted to say which was "It would be an exciting experience." It was also distressing to see how handicapped he

was by this language dysfunction with which he has been struggling from an early age. And while the bilingual problem has certainly compounded his struggles to master the English language, it was equally clear that he had not mastered Spanish that well, also. I did take out a Spanish primer and asked him about some of the common Spanish words and letters, very few of which he was able to read, recognize, or to translate. Hence, it appears that the primary problem is a specific learning disability of the dyslexia type effecting both this word recognition and his written expression language skills.

Response to Mathematics. In order to check out Alex's math levels I did have him do some simple arithmetic computation - addition, subtraction,

multiplication, division, fractions, and percentages. Generally, he was able to handle all of these operations up through the sixth and into the seventh levels.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Alex is a 13 year-old boy who has had a combination of difficulties stemming back to the family system problems, the separation and divorce of his parents, living in South America from ages 6 to 9 years, and subsequent difficulties in communication with his father since returning to the United States and living with him in the summer of 1980.

B. Assets. Alex is a handsome boy. It is also apparent that he is a bright-normal to superior young man in

terms of his intellectual endowment. He makes friends easily, is popular among teenagers, and is struggling to find an identity with which he can be comfortable.

C. Deficits. Alex's primary problem appears to be the lack of intactness in the central nervous system leading to dyslexia which includes word recognition problems, written expression problems and problems in spelling. The source and origin of the lack of intactness is not clear. It is possible related to a genetic pattern or to very subtle neurologic impairment which has been difficult to isolate and to pinpoint. The history of some perinatal distress would suggest this second possibility.

Associated with the lack of intactness and the dyslexia has been an emotional concomitant related to the narcissistic wound. This has strongly influenced his feelings of self-esteem, his sense of worth, and his sense of desire in the academic learning areas.

Finally, there are significant family system problems which have been added on to his primary and secondary problems described above.

D. Recommendations. In view of the degree of language functioning problem it is strongly recommended that Alex attend the Landmark School in Prides Crossing, Mass., which is the educational component of the Learning Disabilities Foundation, Inc. This program is "designed to help young people of promise to realize their full language or its potential, and therefore

is especially intensive in programming on the mastering of skills of reading, writing, spelling, and composition. All of these areas are areas in which Alex is extremely weak.

The second recommendation is that Alex and his father have ongoing counseling in order to improve the quality of communication between them. This could be done prior to Alex's leaving for Landmark School and on the occasions of his returning for vacations.

When he has progressed sufficiently for a high school placement and appears to have strengthened his language are skills, one could consider the Hilltop School where he could function as a day student.

E. Clinical Impression.

Axis I	Attention Deficit Disorder without hyperactivity, DSM III 314.00.
Axis II	Specific Developmental Disorder, with Dyslexia as manifest in word recognition, writing skills, and in spelling, DSM III 315.31.
Axis III	No apparent neurologic impairment, but this needs to be considered, along with the genetic origin for the pattern of dyslexia.
Axis IV	Psychosocial stressor level 4, moderate, due to conflict between his parents, his early life in South America ages 6 to 9 years, and his present conflict and difficulty in communication with his father.
Axis V	Functional adaptive level 3, good with peers; level 4 fair to poor at home with father.

Examiner: William C. Adamson, M.D.
Professor of Child/
Adolescent Psychiatry
Hahnemann University
Phila., Pa.

SCHOOL DISTRICT
EXHIBIT 15

Central Bucks School District.
Doylestown, Pennsylvania

August 10, 1983

Mr. Russell Muth
66 Springs Drive
Doylestown, PA 18901

Dear Mr. Muth:

As you requested during our August 8, 1983 telephone conversation, this communication is designed to summarize our program planning meeting held on June 17, 1983.

Subsequent to your first meeting with me on February 23, 1983 in which you described your displeasure with the LD program at Lenape Junior High School, meetings with the IEP planning team were held on March 11, April 7, and June 17, 1983. Strategies for both home and school were discussed and implemented as a result of these meetings. The final meeting was designed to make recommendations for the 1983-84 school year.

Essentially, the IEP team recommended continuation of Alex in the Learning Disability program at Lenape Junior High with an IEP conference to be held in September to consider an increase of time in the LD room. As you are keenly aware, Alex repeatedly expressed concerns about being different and at one point during the year (March '83) it

was determined appropriate to implement some mainstreaming into the team classes for English and science. This was done on a diagnostic basis in an effort to address our concerns with Alex's lack of motivation and demonstration of emotional distress. For next year, it was felt that Alex may need to be pulled back into the LD program for more time but we would want to give a few weeks to assess this need.

I believe I again communicated to you that based on the current diagnostic evidence available on Alex, he would continue to be considered a learning disabled child. Any change in placement would require a change in his diagnosis. Your consideration of a psychiatric evaluation performed by the school district was also recommended. It was also mentioned that the social worker assigned to Lenape would be facilitating group counseling sessions with students in the LD program, from which Alex might benefit.

It is my hope that the information provided herein is consistent with your perception of the meeting of June 17, 1983. If not, please respond with your comments.

Sincerely,

N. Robert Laws
Director of Pupil Services

SCHOOL DISTRICT
EXHIBIT 17

Russell A. Muth, Jr.
66 Springs Drive
Doylestown, Pennsylvania
18901

September 6, 1983

Dr. N. Robert Laws
Central Bucks School District
Administration Center
315 West State Street
Doylestown, PA 18901

Reference: R. Alexander Muth
Lenape Junior High School

Dear Dr. Laws:

Since Alexander's admission to the Landmark School is undecided and he will be returning to Lenape Junior High School on Thursday, I request a meeting with you to re-write Alexander's I.E.P. to reflect his current needs and to create a program which properly addresses his disability. His present I.E.P. is woefully unsatisfactory.

I look forward to hearing from you.

Respectfully yours,

/s/Russell A. Muth, Jr.

P.S. The material you promised me earlier in the summer has never been transmitted to me.

CENTRAL BUCKS
EXHIBIT 1

DUE PROCESS NOTES OF TESTIMONY, SEPTEMBER 30, 1983:

p. 8, l. 16-20

MRS. SOMMERS': We will show that the education which Alexander received and would receive at the Central Bucks School District is entirely appropriate and that there is no necessity for Alexander's placement outside the school district.

...

p. 27, l. 25 to p. 28, l. 16

CHARLES M. NEILL, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Mr. Neill, by whom are you employed?

A. Central Bucks School District.

Q. In what capacity?

A. As supervisor of special education.

...

p.29, l. 3-8

Q. And in connection with your duties as the supervisor for the special education program, do you have occasion to be involved in the development of the individualized educational programs for the special education children?

A. Yes.

...

p.30, l. 2-5

Q. Did you have occasion to be involved in the development of the I.E.P. for Alexander Muth?

A. I have been involved on conferencing and I.E.P. planning sessions.

...

p.31, l. 21 to p. 32, l. 16

Q. Are you familiar with the learning disability program, the individualized educational program developed for Alexander?

A. Yes, I am.

Q. And in your opinion, why is this program appropriate?

A. According to our evaluations and according to state definitions of standards, our current program is appropriate for Alex.

Q. Why?

A. We can support him in terms of specific learning needs and in the learning resource room and mainstream him where appropriate.

Q. And has that been done?

A. Yes it has.

MS. SOMMER: I have no other questions.

THE HEARING OFFICER: Mr. Muth.

MR. MUTH: Yes.

...

p. 35, l. 16 to p. 36, l. 23

BY MR. MUTH:

Q. Mr. Neill, in your evaluation of Alexander Muth for special education, various programs, what were the major areas of special ed that the child was to receive above normal curriculum forwarded to a Central Bucks child?

A. He received nothing above anything that is offered for any child in the program.

Q. We have two classes of children, probably more than that in Central Bucks School. We have a child who comes through, who is perfectly

normal and receives a regular education and then you have a child with a number of neurological deficits who has to receive various types of special training.

Now, I would like to know, I am asking you what were the deficits that you had to address as a supervisor on Alexander Muth so that I can get to the section of variability?

THE HEARING OFFICER: Let me interject again. I think that Mr. Neill as a supervisor would only be involved with the administrative end of the I.E.P. Those individuals who did the evaluations, the specialized evaluations on Alexander probably participated in writing the actual I.E.P. so that he probably cannot answer the question that you are asking.

BY MR. MUTH:

Q. Well, specifically what I am trying to drive at is that --

MS. SOMMER: I object to him telling us.

...

p. 37, l. 9 to p. 38, l. 17

BY MR. MUTH:

Q. Mr. Neill, when I admitted my son to the school district he was evaluated for a number of deficiencies which he had one which was called speech and language deficiencies and initially it was considered very important for the child to have speech therapy from a practitioner of the Intermediate Unit.

Now, I would like to know why the child was yanked out of that program without informing me and why it was necessary for me, the parent, to have to come back and put the child back in the

program? I am asking why the supervisor of his educational program did not fulfill that obligation, why the weight was pressed on myself?

MS. SOMMER: I object on the basis that as you said before we are not here to decide what he got in the past. We are here to decide whether the I.E.P. that is in effect or would be in effect if Alexander were in our school district at present, which he is not, whether that I.E.P. and whether the education we propose for Alexander would be appropriate. Whether we can provide an appropriate education, not whether there was something in the past that Mr. Muth decided is inappropriate.

THE HEARING OFFICER: The current program that Alexander is in, does it offer speech and language therapy as part of the I.E.P.?

THE WITNESS: I would have to see the I.E.P. I'm not aware of that from memory.

THE HEARING OFFICER: At this time I think that the I.E.P. should be presented and entered as evidence.

...

p. 41, l/ 16 to p. 41, l. 21

JUDITH A. TOLSON, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

...

p. 53, l. 6

CROSS -EXAMINATION

...

p. 55, l. 11 to p. 56, l. 4

Q. Okay, you expressed an opinion in your testimony that there is a wide discrepancy between his ability and his performance. In your evaluation and testing, were you able to determine what the cause of that situation was?

A. The exact cause, well, during the testing and from reviewing all the different records and all the different materials that we have had or the information we have, I would say that because he has an auditory processing difficulty, this has caused him difficulty in reading, math and all the academic subjects.

Q. Okay, who initiated the request for the perceptual hearing tests?

A. Who initiated the request, I think you did.

Q. That is correct. Why was the hearing perception test delayed until the child was in this third year in the school system?

A. I can't answer that.

...

p. 62, l. 20 to p. 68, l. 7

MS. SOMMER: Elizabeth Fallon.

ELIZABETH FALLON, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Miss Fallon, what is your educational background?

A. I have a bachelor's degree in psychology. I have a master's in educational psychology from Temple. I

have been accepted in the doctoral program in school psychology and I have taken some courses in that regard. I am certified as a school psychologist in Pennsylvania and New Jersey.

Q. What is your work history?

A. I have worked for the Central Bucks School District as a school psychologist since January of 1975. I also performed a semester's internship at the Woods Schools working primarily with their learning disabilities program and Dr. Jerry Goldman.

Q. So you have been with the Central Bucks School District as a school psychologist since 1975?

A. Yes.

Q. Since 1975 and during your internship at the Woods Schools, approximately how many students would you estimate that you have worked with?

A. Eight hundred, 900.

Q. Would you describe your job responsibilities with the Central Bucks School District?

A. Children who are having difficulties in school for one reason or another are referred to me. I perform a battery of tests and/or interview, it is essentially diagnostic. I then consult with the school personnel regarding the results and also with the parent, making recommendations for placement, therapy, whatever. I also do a variety of other things such as testing for the gifted program, working individually one-to-one with some of the children.

Q. Do you know Alexander Muth?

A. Yes.

Q. When did you have your first contact with Alexander?

A. The first contact was in March of 1981.

Q. Why were you called on?

A. Mr. Muth had concerns because Alex was having some problems of adjustment in his learning disabilities class. He felt, Mr. Muth felt that it was as a result of a personality conflict between Alex and his LD teacher. I was asked to talk with Alex and come to a conclusion about what the problem might be and what the source of it was.

Q. Did you perform a psychological evaluation at that time?

A. Yes. He had just not long before that been completely evaluated, so what I did was give him a Wide Range Achievement Text to get some idea of where he was academically and also some projective techniques to get some idea

of how he was functioning emotionally. I also interviewed him and the teacher and talked with all the school personnel involved trying to get to the basis of the problem.

Q. As a result of the testing and the interviewing that you did and the review of the various records that you did, did you write a report?

A. Yes.

MS. SOMMER: I would ask that the March 13, 1981 psychological consultation report be admitted into evidence.

(Above-mentioned document marked SD-12 for identification and received into evidence.)

BY MS. SOMMER:

Q. What were the results of the test that you administered?

A. Well, I found that the original question was did Alex indeed have a conflict with the teacher and that was his problem in the classroom and Alex had a problem with self-esteem. He felt uncomfortable being in a learning disabilities class and he blamed the teacher for his being there and that was the conflict, if that could be so called.

I recommended that he be continued in his present academic setting, that periodic sessions with the school guidance counselor be started so that he could talk about his concerns and then also, these could be discussed with Mr. Muth.

Q. Did your testing results indicate or did you come to a diagnosis as to his educational problem?

A. At that time?

Q. Yes.

A. It was obvious that he had a learning disability, but that diagnosis per se had been made prior to that by the private psychologist who had seen him previously before he came to Kutz.

Q. And that private psychologist had been employed by Mr. Muth; is that correct?

A. Yes.

THE HEARING OFFICER: Do we have copies of that psychological evaluation?

MS. SOMMER: Yes, I do. I only have this copy, so I just ask to make a copy before you take it.

(Above-mentioned document marked SD-13 for identification and received into evidence.)

BY MS. SOMMER:

Q. Now, approximately how many times did you meet with Alexander when performing the tests and interviewing him regarding some of the problems he was having in school at the time of this psychological evaluation in March of '81?

A. At that time, I saw him on a couple of occasions and also talked with his father as well as the school personnel.

Q. What were your observations about Alexander's behavior?

A. Behavior during the time I was talking with him?

Q. Yes.

A. He was shy, quiet, soft-spoken young man. He openly talked about his experiences. He had a lot of concerns about primarily at that time being in the learning disabilities class. He was also a relatively new student making a lot of adjustments and wanted to be as much "normal" as possible. He was just a lovable little boy actually who wanted to be part of the mainstream and felt that he was being denied that for no reasons of his own and he was focusing at that time on the teacher as the person who was making him be in the learning disabilities class and making him be, as it were, not normal.

...

p. 69, l. 18-22

Q. Did Alexander tell you about any emotional or family problems that he was having?

A. He expressed concern that his father sometimes got home late and he was alone and he worried about it, yes, at that time.

...

p. 70, l. 17 to p. 75, l. 24

BY MS. SOMMER:

Q. Now, the evaluation that you did in February, would you describe that?

A. I did a Wechsler Intelligence Test for Children Revised, the same test he had been given before entering in 1980. The test scores were verbal 98, performance 139 and full scale 120. They are higher scores than the previous two testings which had taken place two years, almost two years before.

However, the differential between verbal and performance remained approximately the same. I also gave him the Visual Oral Digit Span Test, which is a visual oral cross motile memory kind of test, the Wide Range Achievement, sentence completion.

Q. What were the results of those tests?

A. The results indicated, essentially the WISC-R, the configuration, the high, significantly lower verbal than performance score is suggestive of one of three things, either an auditory problem, an emotional problem or a cultural deprivation.

Now, Alex's background included three and a half years living in South America speaking in a different language. One would expect a child under those circumstances to have a

lower verbal, to have some problem with the language.

Q. Did you notice whether or not Alex spoke with an accent?

A. No, he did not. I think that the increase in the scores could be attributable to the fact that he had had a great deal more exposure in that approximately two-year period to the culture, but there is a definite indication of a language and auditory processing problem, learning disability there in addition.

Q. As a result of the tests and the evaluation, did you also interview Alex?

A. Oh yes.

Q. And what did your interview consist of, what did you talk to him about?

A. Well, we would talk about essentially, I want to know after giving him tests, I gave him the sentence completion test, which is, I would begin a sentence and he would end it and sometimes we can take off from there after I have completed it with some indication of concerns that he might be having.

Q. Did he express any concerns to you?

A. He at that point -- I was particularly interested in his feelings about going into junior high. He had reserve about going, yet on the other hand his friends were going, his perception was he wanted to go with them and it didn't seem he had any more than the ordinary concern of many sixth graders about going into a junior high setting.

Q. As of February of '82, did your psychological testing go into the I.E.P. which was established in March of '82?

A. On the 3rd of March we had a child study team meeting in which a variety of people who are here were in attendance. At that time my report was reviewed, others who had worked with Alex gave their input and we came up with a recommendation for Alex to be placed in either the Lenape Junior High School learning disabilities program or a private school, the Valley Day program and that was considered because of some of the conflicts and emotional concerns that Alex seemed to be expressing.

Q. What kind of conflicts and emotional concerns?

A. Well, many of them had to do with the fact that he did not feel secure at home. He was not -- he mentioned on may occasions to me that he -- well, his father had said that he

didn't have enough money to keep him and he was afraid if he went to his mother, his mother wouldn't have enough money to keep him and what woud happen to him and he had a great number of concerns of this kind.

I met with him during the period of the spring of 1982 and last June, approximately I had 40 contacts with him and his father together, the two of them, either letters, phone conversations, interviews with Alex and during the course of that time he expressed a great deal of concern about such things as my father doesn't love me, he doesn't care about me, he is never home, that kind of thing.

Q. Now, at the child study team meeting, you were present and put your own input and opinions into that; is that correct?

A. Yes.

Q. After the child study team meeting, did you meet with Mr. Muth to advise him of the test results and the team meeting analysis?

A. Yes, I met with him on the 23rd of March of 1982 to give him feedback of both my test results and the child study meeting. I suggested that he meet with Charlie Lang who was then the director of special education, he is no longer in the district, regarding the two alternatives that we were proposing, Lenape's program or Valley Day. I suggested that could go with Mr. Lang to Lenape to look at that program and/or to Valley Day to look at that program and make a decision.

Q. What is the difference between the Valley Day program and the Lenape program?

A. We were recommending Valley Day primarily because they have ongoing crisis counseling.

Q. And why do you believe that was important?

A. Because Alex consistently during the time that he has been in the school district, one of his biggest problems is motivation. There are times when he will come into school and just refuses to work. We have one-to-one tutors sit with him, warm, supportive people trying to get him and he just absolutely refuses to pick up the pencil or do anything and on occasion he will talk about some of the things that are concerning him at that time and on occasion he won't, he just doesn't work.

Q. Did you have occasion to discuss Alex's emotional concerns and the expression of them with Mr. Muth?

A. Oh yes. I tried to make a note on each occasion when I got a note from Mr. Muth or when I called him or he called me and I have these contacts all briefly annotated here.

Q. Did Mr. Muth ever express to you his own concern about his inability to parent the child?

A. He expressed a great number of concerns about the fact that he was a single parent and that how difficult it was and he certainly didn't want to remarry just to have a mother for the child even though that he knows that that would help him and it would be necessary to have somebody at home.

He also mentioned that maybe as a last resort he would have to put Alex up for adoption.

...

p. 77, l. 7 to p. 80, l. 17

Q. Prior to the decision in March of 1983 to mainstream Alexander, what discussions did you have with Alexander about the mainstreaming?

A. One of the reasons that we -- well, during the March conference we discussed the mainstreaming and one of the reasons that that came up was because Alex was becoming more and more withdrawn I guess is a good word, sad. Every time I saw him he would put his head down on the desk and say I don't like to here, I'll never get out of that LD class and he particularly mentioned another child in the class that had been mainstreamed and he was convinced he

could do at least as well as this other child and wanted very much to go into mainstream for at least a couple of subjects.

Q. And you expressed this to the team?

A. On yes, absolutely. We discussed it, everyone had their input as far as you know, what was necessary for Alex and that of course his emotional state at that point was of some concern to us.

Q. After Alexander was mainstreamed in science and English in March 11th, 1983, you monitored him pretty closely?

A. Yes.

Q. And who else did you talk to about his progress?

A. I talked to his two mainstream teachers, also Mr. Talerico, who is his LD teacher. I particularly talked to the mainstream teachers on those occasions and they became more and more frequent when Alex would come into me and I would ask him about how things were going and he would say fine, everything is just fine, I did well today and I got my homework done and I picked up my assignment sheet, which he was supposed to do every morning to get checked up, so I knew he didn't pick up the assignment sheet, so I went to the teachers to see what he was doing and apparently he started off well and he had several absences and the progress became, again, erratic and he would sometimes -- he would come in unhappy and sometimes refuse to do any work.

Q. What kind of support periods were offered to Alexander with his mainstreaming?

A. I have his schedule here.

He went into the LD class to have individual help. It looks like three times a week here, I am really forgetting how much individual help he got in the class, it looks like three times a week.

Q. And that individual help was for the mainstream subjects?

A. Yes, in the LD class.

Q. Did he also receive LD instruction?

A. Oh yes. He went in there for all his other major subjects. He was in an LD program with the exception of these two mainstreams and he was mainstreamed into a team section which is a smaller group with team teaching,

a lot of individualized attention anyway and then he was given support periods with the LD teacher to help out with those two subjects. In other words, getting him out into the mainstream, let him feel like a normal child as it were his big thing and also give him the LD support and see what would happen.

Q. Now, prior to the mainstreaming in 1983, did Alexander appear sad because he was not being mainstreamed?

A. Yes, very much.

Q. And is it fair to say that he was also pretty depressed?

A. Well, I don't know that we could put a clinical depression on him, but he was sad and was withdrawing to some extent, yes.

Q. Did you ever receive any communication from Mr. Muth about Alex being suicidal?

A. Yes. On February 3, 1983, Mr. Muth called and said that Alex was suicidal and I was surprised at this. I asked him what made him feel that way and he said that he had broken into the garage and taken his bike which had faulty brakes on the highway and that as far as he was concerned that would suggest that he was suicidal. I talked about his feelings and I suggested that an appointment with the district psychiatric consultant might be in order.

...

p. 83, l. 24 to p. 84, l. 20

Q. Now, in June of 1983, was there a planning conference to determine whether the mainstreaming should be continued?

A. Yes.

Q. And were you present at that conference?

A. Yes, I was.

Q. What was the purpose of the conference?

A. To discover if the mainstreaming had been successful, whether it should be continued. We concluded that it had not. The original purpose was to try to provide some motivation for Alex within the limited -- we didn't want to take him out of the LD class because he is an LD child, he needed the LD structure, so we provided the team for two subjects with LD help and even that was too much for him and we decided we would not suggest that it be continued.

Q. Did you discuss this or were you present in a discussion with Mr. Muth?

A. He attended the meeting, yes.

Q. And what was Mr. Muth's opinion about this?

A. He agreed that Alex should not be mainstreamed.

...

p. 87, l. 19 to p. 88, l. 7

THE HEARING OFFICER: Before you cross-examine, Mr. Muth. Mrs. Fallon, would you express to me the degree of Alex's learning disability relative to mild, moderate or severe?

THE WITNESS: Moderate.

THE HEARING OFFICER: And what about the emotional disturbance or emotional intrusions?

THE WITNESS: I think that his primary difficulty and inhibiting factor with learning is his learning disability. I think that the emotional intrusion fluctuates and when he

absolutely refuses to work I would call it severe. On other days he can come in and perform and be well, an adjusted happy young man.

...

p. 100, l. 14-24

VINCENT S. TALERICO, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Mr. Talerico, by whom are you employed?

A. The Central Bucks School District.

Q. In what capacity?

A. I'm a resource room teacher at the junior high level.

...

p. 101, l. 17 to p. 106, l. 3

Q. In connection with your teaching at the Lenape Junior High School, did you become involved with Alexander Muth?

A. Yes, I did.

Q. When was your first involvement?

A. I recall the first involvement was December of '82.

Q. And how did you become involved?

A. There was a move put forth to change some of the restrictions on the self-contained classroom to allow those children to flow more through the school and so the self-contained classroom and the resource room classroom was combined.

Q. What do you mean by self-contained classroom?

A. The students who were in the self-contained classroom attended there for all their major subjects, math, reading, language arts and social studies.

Q. Is this a special ed class?

A. Yes, it is.

Q. And specifically a learning disability class?

A. Yes.

Q. How many people were in the self-contained classroom?

A. At the time I recall there were 14. They were not always there though, so sometimes the seventh graders would be out at a special, meaning art, phys. ed, health, the eighth graders may be out. Generally at one time I would say there were no more than eight or nine there.

Q. Now, you said that there was going to be some provisions in allowing the children to flow through the school and how was this to be accomplished?

A. We combined our program so that I took all of the students for math and reading and the self-contained teacher took the students for science, social studies, language arts.

Q. How did you become involved with Alexander?

A. I started seeing Alexander approximately in December for math and reading at that time.

Q. Now, prior to March of 1983, can you describe Alexander's program?

A. According to the I.E.P.?

Q. Yes.

A. The program was based on the I.E.P. of the year previous which was

then set up to remediate for phonetic difficulties in the area of math. I believe at that time it was set up for whole numbers.

Q. In March of '83, were there changes made?

A. Yes.

Q. And what were those changes?

A. Because of some feeling on Alex's part to want to be mainstreamed into the English class and science class, there was a change in his program to allow him to have that mainstreaming, still continue to see me for English --- or excuse me, for reading and math and also for support periods. He would have no contact with the self-contained teacher.

Q. Now, what do you mean by support periods and how often were they?

A. I believe the support periods were three times a week. The support periods were designed to allow Alex time to work on assignments given him in English and science. The time was also spent on allowing Alex to work on homework if the assignments were completed in the other areas.

Q. Was there a specific homework regimen established for Alexander?

A. At the outset of the program, Alex was to pick up a homework assignment slip from the guidance counselor every morning and his assignments in English and science were to be written on those, taken home, shown to his father, his father would sign the slip and the slip would be returned the following morning. Alex

from the outset of the program failed to pick up the slip. I have no recollection if the slips were ever returned. I know Mr. Wagner, the guidance counselor, always had to seek Alex out to give him those slips.

Q. So that he did obtain the slips?

A. Yes.

Q. Was there a problem encountered with Alex and homework?

A. Yes, Alex at the beginning of the program was having a great deal of difficulty doing the required homework and subsequently it was set up that 15 minutes per night would be required.

Q. Now, the mainstreaming and the support groups were two of the changes that were effected; is that correct?

A. Yes.

Q. And there was also then that you took over in reading and math?

A. Yes.

Q. How did you perceive that these changes would help Alexander?

A. The changes I felt would help Alexander only in the area of self-esteem. I was skeptical about the mainstreaming given Alex's motivation that I had seen in the resource room in the areas of reading and math. His attention to task, his ability to complete work and I was very skeptical about his mainstreaming and what would be required of an LD student in the mainstreamed class.

Q. How much contact did you have with Alex on a day-to-day basis, what period of time?

A. I approximately saw Alex on an average of two periods per day. I would say that roughly would come out to about 90 minutes.

...

p. 110, l. 1 to p. 111, l. 17

Q. Were you able to observe improvement from March of '83 to the end of the year in Alexander's achievement?

A. Yes, I was.

Q. Describe those observations?

A. The observations were based on in-class performance on instructional materials and I felt they were corroborated by the end-of-the-year testing.

Q. How did Alexander fair with the mainstreaming?

A. He started the first two weeks and was able to, as I recollect, maintain and stay with the rest of the

group, but a considerable deterioration followed after that. He was unwilling to put forth the effort to do the required assignments even on a one-to-one basis in the support periods, Alex did not want to put forth the effort. He wanted the answers or the materials to be covered, done by myself or the aide who was working with him rather than having Alex do it.

I want to point out also that there were other LD students in this mainstreamed classroom who were able to do the required assignments and did succeed.

Q. Now, you did mention that you worked with an aide. How much of Alexander's time would you say that the aide dealt with him?

A. The aide accompanied Alex to the English and the science classrooms, more times the English classroom to make sure that she could provide support in that classroom if Alex needed it. When she worked with me in the classroom, in the resource room, she would support Alex or I would support Alex whenever he had a difficulty. She also supported Alex during the support periods I believe two out of the three days.

Q. Now, who was this aide?

A. Mrs. Barbara Horn.

Q. And what were her qualifications?

A. She is a -- has a degree in the area of recreational education.

...

p. 112, l. 18 to p. 113, l. 2

Q. As a result of the unsuccessful experience with the mainstreaming, was there a modification of Alexander's program proposed in June?

A. Yes.

Q. And what was that modification?

A. It was felt that he would be best treated if he had increased time in the LD program, which means that he would not only see me for reading and math, but then attend the self-contained classroom for the other academic subjects.

...

p. 114, l. 23 to p. 118, l. 7

Q. Now, do you have an opinion as to what an appropriate educational program for Alexander would be?

A. Yes, I feel that Alex could best be served in a combination of the self-contained classroom and resource room setup that we have at Lenape Junior High School.

Q. Why do you believe that the mainstreaming concept is inappropriate for Alexander?

A. Alex lacks the consistent motivation to achieve in a class where specific requirements are laid out for a group of students. He is unable to follow through on assignments, to tend to what is going on in a large group of 18 to 22 students.

MS. SOMMER: No other questions.

THE HEARING OFFICER: Mr. Muth.

CROSS-EXAMINATION

BY MR. MUTH:

Q. You related in your testimony that the self-contained room and the resource room were combined. What was the motivating factor to restructure those two rooms into a single program?

MS. SOMMER: Objection.

THE HEARING OFFICER: Since Mr. Muth is a parent, I am going to allow him to continue with those questions. Go ahead.

THE WITNESS: It was felt in late November the one self-contained teacher as has been stated already, her father had died and a long-term substitute had taken her place. It was felt after the long-term substitute had been there that there was a great deal of difficulty with the feelings on the self-contained students that they had to be in one area through the day and would it be possible to combine my classroom and the

self-contained classroom. I was agreeable to such move because it would provide less restriction and more of a less restrictive environment for those children.

BY MR. MUTH:

Q. Was it not felt that the very act of permitting those children to walk from class would be a very good method of alleviating the great deal of stress that the children were experiencing?

MS. SOMMER: Objection as to the stress portion.

THE HEARING OFFICER: Okay, we discussed the use of that term before. Would you rephrase that, Mr. Muth, if you can come up with a synonym?

BY MR. MUTH:

Q. Is it not true that it was felt that by giving the children an opportunity to walk between classes that this opportunity would alleviate them of the boredom of staying in one particular room for a long period of time?

A. The reason for the move was based on increasing their self-esteem through allowing them to travel through the halls from class to class as their peers did.

Q. You related in your testimony that after the March I.E.P. conference it was agreed by the district and the parent that support periods would be put into effect?

A. Yes.

Q. Were those support periods used to give Alexander tutoring by a certified learning disability teacher?

A. On occasion I provided some support to Alex during those support periods.

Q. Is it not true that the bulk of the so-called support was actually provided by the aide, one Mrs. Horn?

A. Yes.

Q. And did you reveal in your testimony that Mrs. Horn has a degree in recreation education?

A. Yes.

Q. Does Mrs. Horn have any specialized training academically in the field of learning disability?

A. No specialized training.

...

p. 124, l. 3 to p. 125, l. 9

THE HEARING OFFICER: I have one question. During the period of time you worked with Alex, he was being mainstreamed, he was not in a self-contained class?

THE WITNESS: He began the year in the self-contained class. The self-contained and the resource room were then combined in December when I started working with him, then he was mainstreamed in March and had no contact with the self-contained room.

THE HEARING OFFICER: Was there any marked differences in his behavior when in the self-contained class as opposed to when he was in the mainstreamed class?

THE WITNESS: General behavioral characteristics were constant throughout the year, although I would say there was

an increase in frustratin and motivation when he was mainstreamed.

THE HEARING OFFICER: All right, thank you.

MS. SOMMER: Dr. Laws.

DR. N. ROBERT LAWS, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. By whom are you employed?

A. The Central Bucks School District.

Q. In what capacity?

A. I am director of pupil services.

...

p. 126, l. 25 to p. 128, l. 1

Q. At the programing planning conference on March 11, 1983, what took place at that conference?

A. Well, it was in fact a program planning I.E.P. conference to revise and modify Alexander's I.E.P.

Q. Was an effort made to place Alexander in a less restrictive environment?

A. In terms of mainstreaming him to a greater degree?

Q. Yes.

A. Yes. In fact, part of the need for revising Alexander's I.E.P. stemmed around my original conversation with Mr. Muth which essentially was that he was displeased with the one teacher that Alexander had. We then went into address that. Mrs. Fallon at the time had also commented that she was much

concerned about Alexander's current emotional state, so we felt that a modification was in order. A modification included mainstreaming in two team subject areas.

Q. And did Mr. Muth --

A. I need to add, however, that that mainstreaming was done on a diagnostic basis. The team in fact --

Q. What does that mean?

A. Well, in fact we wanted to see if it would in fact help Alexander respond to our programing.

...

p. 139, l. 13 to p. 140, l. 23

BY MR. MUTH:

Q. You had related in your testimony that you had advised me to communicate with the Intermediate Unit in regard to the services that they

could possible provide for learning disabled children, is this not correct?

A. That is correct, on a phone conversation of May 12th.

Q. Is it not true also that I attempted to communicate with the Intermediate Unit and they in turn referred me back to you?

A. I believe that was the chain of events.

Q. And that they refused to communicate with me at all because the Intermediate Unit only deals with the school district and not the parent?

A. I believe somewhere I saw a letter that you had received from Dr. Good at the Intermediate Unit, so I know that they did communicate with you. Exactly what they said to you I obviously wouldn't know.

MR. MUTH: I have no further questions.

THE HEARING OFFICER: Dr. Laws, before you leave, as of today, what program is Alexander in? Is he in full time or is he still in the resource room?

THE WITNESS: Well, Alexander is in the Landmark School in Boston.

THE HEARING OFFICER: Okay, if he were here, what program would he be in?

THE WITNESS; Okay, we would have by now revised his I.E.P. to reflect a full-time program were he to still be here. The mainstreaming we viewed to be not appropriate.

MS. SOMMER: No questions. That's all the evidence we have, sir.

...

p. 160, l. 11 to p. 160, l. 16

CHARLES M. NEILL, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

...

p. 164, l. 3 to p. 167, l. 7

BY MR. MUTH:

Q. Okay, my next question to Mr. Neill is why was there such an enormous delay in the auditory perception testing that really demonstrated that my son had an auditory perception deficit?

THE HEARING OFFICER: Okay, Mr. Muth, again, let me stop you. The delay, I am sure is significant, however, the diagnostic testing was

completed and I do have that information.

MR. MUTH: What I am trying to establish, Mr. Tent, is the fact that the child was in the school district two and a half years before the appropriate testing was done, hence, the child did not have the opportunity to have an appropriate program created for him because the appropriate testing hadn't been completed.

MS. SOMMER: I object to that characterization.

THE HEARING OFFICER: Your objection is noted and again, we have to deal with the current placement and the current program that has been offered. We can't digress and discuss a program which is no longer in effect. We are here to

determine whether his current program is appropriate.

BY MR. MUTH:

Q. Okay, I guess my final question to Mr. Neill is, I have asked for and my latest request with regard to this matter was on February 27, 1983, that the child receive tutoring in the Ortan/Gillingham method of remediation of the dyslexic condition that the child has. I would like to know why the school district rejected my request for the tutoring in the Ortan/Gillingham method?

MS. SOMMER: I object.

THE HEARING OFFICER: Again, your objection is noted. I think Mrs. Tolson who is familiar with the Ortan/Gillingham method testified that she is quite familiar with it and she

did participate in the planning of the I.E.P. and the efficacy of the Ortan/Gillingham method is not of major importance at this time. That is not a program per se, but a method.

MR. MUTH: That is true, but it is the method of choice in the treatment of dyslexia.

THE HEARING OFFICER: Okay, ultimately the method or methods utilized are determined by the personnel running the programs and I am sure that in most cases they do not utilize one program. They use -- it is a collective approach and the Ortan/Gillingham method may or it may not have been one of the methods that was utilized. We are not here to discuss that.

MR. MUTH: Are you stating to me that the parent does not have the right to specify the type of training that his child will receive?

THE HEARING OFFICER: What I am suggesting to you is that the state sets minimum standards for a school district's employees and inherent in those standards is the assumption that these individuals are qualified to administer a specific program which deals with specific handicaps. If those individuals are teaching your son, then the assumption is that they are qualified.

MR. MUTH: What is at issue, Mr. Trent, I believe is whether the program is adequate as well as appropriate, so states the hearing officer's handbook. The question that would come up is what constitutes

adequacy and that would have to do with regard to whether the child is being habilitated and remediated and at this point in time what we see is a spread of three and a half years between his reading level and his grade placement. This is the same spread he had when he came into the school system. So that whatever the school system is prescribing is not working, it is not adequate, it is not efficacious.

THE HEARING OFFICER: All right, do you have additional questions for Mr. Neill?

MR. MUTH: No, I don't.

...

p. 173, l. 4 to p. 174, l. 7

MR. MUTH: Okay, one of the things that I stated in my opening statement was that I did not feel the district was meeting the child's individual needs and

to refute the fact that the district has claimed that they are meeting his individual needs, it would be necessary for me to question a number of individuals and attempt to establish the fact that if an adequate program was in effect, many of the behavioral problems that are seen in the child would no longer be manifested, but obviously I don't think you are going to let me try and establish that.

THE HEARING OFFICER: All right, what we have established is that children who have been diagnosed as LD also have secondary emotional problems. This is what you are stating now. Are you also suggesting that the school district is not addressing the emotional aspects of Alexander's learning disability?

MR. MUTH: I am saying if the appropriate program was in place one would not see the extensive emotional behavior that the child is manifesting.

THE HEARING OFFICER: All right, I did say that at the beginning of your testimony that the submission of evidence that you present should relate to me and to this body what you feel is an appropriate program. The school district has stated what it feels an appropriate program is.

...

p. 179, l. 14-20.

MR. MUTH: There are two other areas that I feel are germane to Alexander's situation. One is the amount of related services and the other issue has to do with motivation. Now, in my letter to Dr. Laws on February 27, 1983 --

MS. SOMMER: Is that a part of the record? It is not.

...

p. 181, l. 2 to p. 183, l. 22

MR. MUTH: Okay, in my letter of February 27, 1983, I requested that, "Temporarily, Alexander is to receive one-to-one teaching until the damage he has suffered from mid December through February has been repaired or transcended," and in earlier testimony by Mr. Talerico he related that most of the support services that were given to my son were actually given by an aide, Mrs. Horn and I believe that is an example of not giving the appropriate related services.

In addition, it is my point of view that the child should be receiving intense psychological counseling because

the dyslexia was of a severe nature and that Mrs. Fallon had related that over the course of two years and please correct me if I have misheard you, that she has seen this child approximately 40 times and it is my particular feeling that the counseling should have been at least three times a week until the child's mental health is stabilized.

THE HEARING OFFICER: Do you have questions of Mr. Muth?

MS. SOMMER: Yes. Is he done?

MR. MUTH: Yes.

CROSS-EXAMINATION

BY MS. SOMMER:

Q. Mr. Muth, on this February 27, 1983 letter I notice on page two you have indicated that it is essential that Alexander be kept in his local junior

high school to maintain his psychosocial milieu, that is what you said, did you not?

A. Yes, it was my belief at that point in time.

Q. And you would agree that absenteeism was a problem with Alexander?

A. Yes, it was a byproduct of the high stress atmosphere.

Q. Now, from whom did you determine that Alexander was in what you call a high stress atmosphere?

A. The child demonstrated a number of psychosomatic complaints, he was taken to Children's Hospital in Philadelphia. He was examined by an internist, a gastroenterologist there and that was where the opinion was rendered.

Q. And where is that opinion today?

A. The intimate details of my son's medical background are not part of this proceeding.

Q. Even though that they could and certainly in your opinion do become intimately involved with the educational system?

A. I believe, Miss Sommers, that in U.S. Code 1232(h), I am permitted to withhold private information such as that whenever I see fit.

Q. And it is true, is it not, that Dr. Adamson's report in no way indicates there are any kind of physical illnesses which are psychosomatic in nature?

A. I can't remember all eight pages of Dr. Adamson's report, so I can't answer that question.

Q. Did you hire Dr. Adamson to do this report?

A. Yes, I did.

Q. And how much did you pay him?

A. I'll tell you in a second. Three hundred and five dollars.

Q. And on how many occasions did you visit with Dr. Adamson?

A. I saw him three times and my son saw him three times.

...

p. 186, l. 3 to p. 187 l. 1

Q. Now, you requested psychological counseling for Alexander, did you not?

A. That is correct.

Q. And in fact when that was not agreed to by the district you did not get psychological counseling for Alex yourself?

A. In the --

Q. Yes or no, Mr. Muth, did you or did you not?

A. It was my opinion that under the terms and conditions of the responsibilities of the district that they should provide it. I could not afford it, let's put it that way.

Q. So you didn't?

A. I did not obtain it privately.

Q. Yet you have afforded to send him to the Landmark School?

A. I have been very fortunate and I have received funds in the month of September and I have funds due in the month of October which will allow me to at least get the child started in that school. Those funds were not available in the past.

MS. SOMMER: I have no other questions.

...

p. 187, l. 14 to p. 187, l. 21

ELIZABETH FALLON, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. MUTH:

...

p. 192, l. 10-23

THE HEARING OFFICER: All right, let's take closing statements first from the school district, secondly, from Mr. Muth and I have stated the appeal procedure and I have issued written copies of that procedure. Ms. Sommer.

MS. SOMMER: Thank you, Mr. Trent. The school district of Central Bucks School District has presented evidence today and a substantial amount of evidence that they are dealing with the unique and specialized needs of Alexander Muth in a very personal and very appropriate way.

It has been totally uncontradicted that the program which the Central Bucks School District offers is appropriate.

...

p. 195, l. 7 to p. 197 l. 3

THE HEARING OFFICER: Mr. Muth.

MR. MUTH: As I stated in my opening remarks, I do not feel the Central Bucks School District is providing for my son's individualized needs. The basis of my stating that the needs are not being met rests in two areas. The first area is the fact that the very keystone,

the very center point of the educational process is the development of reading skills. In the case of my son, Robert Alexander Muth, there has been no substantial growth in his reading ability and the spread between his grade placement and his functional reading level still remains at a disparity of three and a half years. This disparity is the essential reason that the child is not able to function appropriately in a regular classroom. The disparity also produces high stress defined as inordinate anxiety in the individual and the end result is that this high level of anxiety destroys the child's ability to be motivated towards the learning experience that is being presented to him.

Furthermore, the high stress atmosphere and the high anxiety which accompanies it is exacerbating -- I'm sorry, is exacerbating his mental problems to the point where it became necessary to remove him from the Central Bucks system and place him in a school where he is functioning in a very superior manner.

In addition, the Central Bucks School District has refused to give the proper amount of related services to the child. He has not received the amount of counseling which his situation requires and he has not received the appropriate one-to-one tutoring which is necessary for him to function appropriately in the classroom. I think that the district's representative has engaged in a large number of self-serving statements and declarations

and that a considerable amount of my ability to produce countering testimony has been effectively blocked by the combination of the Hearing Officer and the district's representative.

My bottom line in regard to this situation is that there is essentially no growth and that now that the child has been placed into another learning situation, the inappropriate behavior has ceased and the academic growth has developed quite nicely.

PLAINTIFF'S EXHIBIT 1

DUE PROCESS HEARING
September 30, 1983
10:15 A.M.
for Robert Alexander Muth

A hearing in the above entitled matter was held on the above date at the Central Bucks Administration Building, Route 202, Doylestown, Pennsylvania
Before: Vernard Trent, Hearing Officer
Date of Decision: October 31, 1983

HEARING OFFICER'S REPORT

1. Names and Functions of Those Attending the Hearing:

The names of those attending the hearing are listed on page two (2) of the transcript.

2. List of Exhibits:

Exhibits are listed on page three (3) of the transcript.

3. Background of Hearing and Terse Statement of the Position of Each Side:

Robert Alexander Muth is a student in the Central Bucks School District, diagnosed a learning disabled. According to Mr. Muth (N.T. p.9), "the Central Bucks School District in conjunction with IU#22 has failed to provide my son, Robert Alexander Muth, with an appropriate program of special education in a class which will address the student's individual and educational needs as they are reflected by the student's exceptionality and resultant educational deficits." It was also stated (N.T. p.13) that "the Central Bucks School District has refused to supply the appropriate support or related services that were critically needed for Robert Alexander Muth." As such, a due process hearing was

requested pursuant to 22 Pa. Code 13.33 (1)(iv) and 13.32 (9)-(24) to determine that appropriateness of the educational program.

The Central Bucks School District's position is "that Alexander Muth is receiving an appropriate education according to the state standards and federal requirements and that he is receiving this education in the least restrictive alternative." "The education which Alexander received and would receive at Central Bucks School District is entirely appropriate and that there is no necessity for Alexander's placement outside the school district" (N.T. p.8).

4. General Issues to be Resolved:

A. Determination if the recommended school district LD program is less than

an appropriate program of education and training, thereby necessitating placement outside the school district.

B. Determination if appropriate support and related services were supplied.

5. Evidence Presented by the Parties

A. School District Evidence

Judith A. Tolson, Diagnostic Learning Consultant, discussed the results of a 3-2-83 educational evaluation which indicated specific strengths and weaknesses (N.T. p.45, SD-10). The Woodcock-Johnson Psycho-educational Battery yielded the following respective grade levels in reading, mathematics, and written language: 4.9, 6.4 and 3.9. These scores indicated a "severe discrepancy

between Alexander's ability and his achievement" (SD-10 p.1). The Standard Reading Inventory indicated an instructional level of 32 while the Key Math Diagnostic Arithmetic Test indicated a grade score of 59. A grade level of 33 was recorded on the Test of Written Spelling and no score reported on Written Expression due to a lack of cooperation. Student behavior hampered accurate assessment (SD-10, p.3). Continuation in the L.D. class was recommended (N.T. p.47)

Evaluation by the district reading specialist divulged an instructional level of 4 (SD-11).

Initial psychological testing (9-26-80) by Thomas E. Akins, Ph.D. found "a child with a primary language disability/communication handicap with expressive and receptive features"

(SD-13). Subsequent psychological testing by the school district (3-13-81 & 2-25-82) portrayed a young man experiencing emotional duress due to reduced self esteem. Cognitive assessment (WISC-R) revealed functioning in the Average to Very Superior range of intelligence with a Verbal IQ of 98, Performance IQ 139 and Full Scale IQ of 120. Program recommendations by both psychologists alluded to the possibility of private school placement (SD-13 & 14).

An Auditory Language Processing examination (SD-3) by IU #22 suggested that Alexander has an auditory analysis problem. More specifically, an auditory analysis problem (inability to separate auditory units into parts) and an auditory synthesis problem (inability to blend component parts to form a meaningful unit such as syllables or

sound to form words). Visual aids and auditory training were recommended. Speech and language testing (SD-6) indicated a need for continued language therapy.

Four (4) Individualized Education Program Plans (SD-2,7,8 & 9) were submitted. All four provided an LD Resource Room with speech and language therapy offered as a related service. The 3-11-83 I.E.P. offered mainstreaming in English and Science while the others (9/80-SD-F, 2/81-SD-8 & 3/82-SD-9) provided for mainstreaming in the related arts i.e. art, music, library and physical education.

B. Parent's Evidence

Mr. Muth, Alexander's father, was the only witness presented by the parents (N.T. p. 147). Over the objection of district counsel the

qualification letter of Dr. Adamson (P-1) and psychiatric evaluation (P-2) were admitted as evidence (N.T. p. 143-149).

The psychiatric evaluation found Alexander's primary problem as "lack of intactness in the central nervous system leading to dyslexia which includes word recognition problems, written expression problems in spelling." The etiology was suggested as a genetic patterns or very subtle neurologic impairment. Associated with the primary condition was an "emotional concomitant related to the narcissistic wound" and "significant family system problems" (P-2, N.T. p.152).

Mr. Muth questioned the validity of the I.E.P. stating that it had "been manipulated inappropriately" (N.T.-162). Yet he admitted signing the

I.E.P. (N.T. 163). It was also noted that Alexander had been in the Central Bucks School District two and one half (2 1/2) years before receiving a central auditory processing evaluation (N.T. 164).

Questions were raised as to why the youngster did not receive tutoring in the Orton/Gillingham method of remediating dyslexia (N.T. p. 165 & 174).

Mr. Muth also questioned the amount of related services, the issue of Alexander's auditory perceptual dysfunction not being addressed (N.T. 164) and the emotionality being a function of an inappropriate program in school as well as his home life (N.T. 190).

6. Uncontested Facts:

That Alexander is a learning disabled student experiencing auditory

perceptual dysfunction and secondary emotionality. Citations in section seven (7) below.

7. Findings of Fact:

Alexander is a learning disabled student experiencing auditory perceptual dysfunction and secondary emotionality (N.T. pp. 31-47-71-84-85-133-P2, SD3, SD12, SD13, SD14). The LD combined with the emotionality presented problems in educational programming, precipitating several conferences to make adjustments to the program (N.T. 16-17-18-20-21). It was noted that the student exhibited an "inability to work even one-on-one with an aide (N.T. p.18). The psychological report (SD-14) divulged a Verbal IQ of 98, Performance IQ 139, and a Full Scale IQ of 120. The psychologist noted intellectual functioning in the Average and Very

Superior range with a language disability continuing to impede academic progress. In addition, evidence of a diminished self esteem as well as depressive qualities was recorded. SD-14 also describes a significant lag in scholastic achievement. Discussions were held with the Child Study Team relative to placement in the LD program at Lenape Junior High or Valley Day, a private school for LD youngsters. Involvement in a professional counseling milieu was also recommended.

Psychiatric examination (P-2), reported the primary problem as a "lack of intactness in the central nervous system leading to dyslexia" with an "emotional concomitant related to the narcissistic wound" and "significant family system problems." P-2 also reported no apparent neurologic

impairment. Private school placement was also recommended.

An Auditory Language Processing examination (SD-3) by IU #22 delineated auditory perceptual dysfunction in auditory analysis and auditory synthesis. Auditory training techniques and visual materials were recommended. The above mentioened evaluation was secured due to parental insistence (N.T. 55-56).

Evaluation by a Diagnostic Learning Consultant indicated highly significant academic underachievement (SD-10, N.T. 47-49). The following assessment data was reported: Woodcock-John Psycho-educational Battery, reading 4.9, math 6.4 and written language 3.9. Standard Reading Inventory, instructional level 32; Key Math Diagnostic Arithmetic Test, grade score

5.9; Written Language, spelling grade score 3.3. Test results may not be a true measure of academic ability (SD-10 p. 3). The reading specialist's report tells of factual recall ability which is appropriate to the third grade reading level. Inferential reasoning was very poor (SD-11). Written language and grammatic usage difficulty indicated a need for continued language therapy.

The I.E.P. (SD-2) and Notice of Recommended Assignment (SD-4) do not describe an appropriate program for Alexander's learning disabilities. Although the speech and language I.E.P. (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities. The social and emotional concerns are not addressed on the I.E.P. According

to testimony, Alexander was mainstreamed on a diagnostic basis to see if he would respond to programming (N.T. p. 27). Behavioral success and adjustment was not evident in either the self contained room nor the resource room. Indeed, when mainstreamed, an increase in frustration was noted although general behavioral characteristics throughout the year was constant (N.T. p. 24).

Cognitive abilities range from average in the verbal cognitive domain to mentally gifted in the non-verbal cognitive domain as evidence by a Verbal IQ of 98 and a Performance IQ of 139. This represents a significant change in intellectual functioning-1980 Verbal IQ 75, Performance IQ 115 and Full Scale IQ 92. The change was attributed to exposure to the American language culture and educational activities

(SD-14). Yet, reading level discrepancies remain at approximately three and one half (3-1/2) years.

There is some evidence to indicate minimal brain dysfunction (P-2) and social and emotional disturbance (P-2, SD 12-13-14) but not severe B.I. or severe emotional disturbance.

There is evidence to suggest the need for a more restrictive educational setting. (P.2, SD-5-10-12-13-14 & 15).

8. Conclusions of Law

Alexander is a learning disabled child which is considered an exceptionality warranting special education under Pennsylvania law; 22 Pa. Code 341.1(iii) and according to evidence presented in SD-5, SD-10, SD-12, SD-13, SD-14, P.-2, N.T. 16-17-20-21-29-31-32-47-49-60-102. He

has a significant deficiency in the acquisition of basic learning skills, such as motor skills and general learning difficulties. He also exhibits speech and language impairment (P-2, SD-2, SD-3, SD-6, SD-9, SD-12, SD-13, SD-14) according to 22 Pa. Code 341.1(ix). Associated with the learning disability are emotional intrusions (P-2, SD-12, SD-13, SD-14). He may have some level of brain dysfunction associated with CNS dysfunction (P-2) but it is not sufficient to warrant a classification of Brain Damages as denoted in 22 Pa. Code 341.1(i). Finally, Alexander's cognitive abilities range from average to mentally gifted. The latter (MG) is covered under 22 Pa. Code 341.1(iiii). The program (SD-2, SD-5) advocated by the school district is appropriate relative to

classification but inappropriate relative to effectiveness and efficiency as required by 22 Pa. Code CH-13.11(a)(b).

9. Recommendations

A. That the Central Bucks School District, immediately, meet with the parents of Robert Alexander Muth to discuss and explore alternative placement in a more restrictive educational setting according to 22 Pa. Code 13.11. The student has not made appreciable gains in reading (SD-10, N.T. 60) and socio-emotional difficulties seemingly have been exacerbated by the current placement (N.T. 22-23-74-88-89-102-133-156-157-166 SD-14). Programmatic changes have not alleviated the emotional district or facilitated the acquisition of necessary academic-social and vocational skills.

B. That the significant auditory perceptual dysfunction addressed through the speech and language I.E.P. be translated into instructional strategies and classroom activities (SD-3-SD-4).

C. That the socio-emotional difficulties be addressed through intensive counseling-crisis intervention and an effective program of behavior modification. The parents should also be referred for family therapy.

D. Vocational counseling and guidance should be explored.

E. When developing a program for the youngster-consider his potential to function within the mentally gifted range and provide special activities or services not ordinarily provided in the regular program in accordance with 22 Pa. Code 341.1(iiii) - Mentally Gifted.

F. In so much as the Ortman/Gillingham Method is a technique of instruction in reading for the learning disabled and not a complete program, the parent's exception is dismissed.

DATED: October 31, 1983

HEARING OFFICER: Vernard Trent

PLAINTIFF'S
EXHIBIT 2

In the Department of Education
Commonwealth of Pennsylvania

In Re:
The Educational Assignment of Robert Alexander M., a student in the Central Bucks School District : Special Education Opinion No. 227

BACKGROUND

Robert Alexander M. (Alexander) is a seventh grade learning disabled student, as that term is defined in 22 Pa. Code § 341.1(iii), who was placed in a special education program for the learning disabled during the 1980-81

school year, at Lenape Junior High School (Lenape) in the Central Bucks School District (district).

In March of 1983, an Individualized Education Program (IEP) was developed for Alexander proposing that his placement at Lenape continue for the 1983-84 school year, that Alexander be mainstreamed for English and science, and that he continue to receive resource room support in reading and mathematics. On March 11, 1983 the district issued a Notice of Recommended Assignment for the Lenape placement described above and sent it to Alexander's father. Alexander's father approved this placement and program proposal.

Prior to the implementation of the March 1983 IEP, several meetings were held between the multi-disciplinary team

and Alexander's father due to Alexander's unsuccessful experience with mainstreaming during the 1982-83 school year. As a result of these meetings, in June of 1983, a modification of Alexander's March 1983 IEP was proposed by the district recommending that Alexander's mainstreaming be discontinued and that he be placed in a self-contained classroom for learning disabled youngsters.

On June 20, 1983 the district received a request for a due process hearing from Alexander's father because he disagreed with the district's proposed placement for Alexander. The due process hearing was held on September 30, 1983, to determine whether the district's proposed placement constituted an appropriate program of education, with appropriate support and

related services; or whether Alexander's father was correct in his contention that the Lenape placement was not appropriate for Alexander and that private school placement outside the district must be secured.

The hearing officer rendered his decision on October 31, 1983. He found that the March 1983 IEP and NORA did not describe an appropriate program of special education for Alexander's learning disabilities and he recommended that the district place Alexander in a more restrictive educational setting. The hearing officer did not, however, order that Alexander be placed in a private school, nor did he find that the district was unable to provide Alexander with an appropriate education.

Due partially to the lack of specificity in the hearing officer's

findings and recommendations, both Alexander's father and the district filed exceptions to the hearing officer's decision with the Secretary of Education. It is these exceptions which are the subject of the present appeal.

DISCUSSION

Alexander's father excepts to the recommendation of the hearing officer because of his failure to order a private school placement for Alexander.

The district replied to this exception stating, among other things, that there is no evidence on the record to support the contention by Alexander's father that the district has not and cannot provide an appropriate special education program for Alexander. Furthermore, the district contends that there has been no evidence presented to support the placement of Alexander in a private school setting.

The district concedes, in its Reply to Alexander's father's exceptions, just as it did by the testimony that it presented at the hearing, that the March 1983 IEP, as drafted, is not appropriate to address Alexander's special education needs. At the hearing, the district stated that it had proposed a more restrictive educational setting for Alexander in June of 1983, which modified the March 1983 IEP (N.T. 112-113). This modification was proposed as a result of several meetings between the district and Alexander's father which eventually ended with both parties in agreement that mainstreaming Alexander for certain subjects would only continue until early September of 1983, when a program planning conference would again be held to evaluate Alexander's educational needs. (N.T.

84). This more restrictive educational setting was determined to be necessary for Alexander because of an unsuccessful attempt to mainstream Alexander for certain courses during the 1982-83 school year.

Also, in its Reply, the district alleges that the evidence of record shows that the district is capable of providing a more restrictive educational setting for Alexander, as required by the hearing officer in his recommendations, and that the modifications it proposed in June of 1983, to the March 1983 IEP, constitute an appropriate program of special education for Alexander.

In addition to its Reply to Alexander's father's exceptions, the district also filed its own exceptions to the hearing officer's opinion,

alleging that the findings of fact are inaccurate and incomplete due to the fact that the hearing officer failed to take into account the proposed education program offered to Alexander's father in June of 1983; which, as noted above, recommended a more restrictive learning environment for Alexander.

After a careful review of the record, we find that the district's exception, as to the hearing officer's failure to take into account the proposed modifications to the March 1983 IEP, is meritorious and we, therefore, sustain that exception. We reverse and remand to the district with instructions that the district proceed with the revision of the March 1983 IEP for Alexander regarding those modifications determined to be necessary to provide Alexander with an appropriate program of special education.

The hearing officer shall retain jurisdiction of this case and, if the district and Alexander's father cannot agree upon a revised IEP for Alexander, shall reconvene the hearing herein and subsequently make further findings of fact, conclusions of law and recommendations regarding whether or not the district's revised proposed placement is appropriate for Alexander.

Because we have reversed the hearing officers [sic] decision, due to his failure to decide the appropriateness of the district's modified program offer of June of 1983, we find it unnecessary, at this time, to deal with the other issues presented by both Alexander's father and the district. These issues, however, may be raised before the hearing officer at any reconvened hearing and may, of course, once again be raised here should

the hearing officer's decision, again be challenged by either or both parties.

Accordingly, we make the following:

ORDER

This 23rd day of January 2984, it is hereby ordered that this matter be remanded to the hearing officer for further proceedings consistent with this opinion.

/s/ Robert C. Wilburn
Secretary of Education

SCHOOL DISTRICT
EXHIBIT 18

Central Bucks School District
Doylestown, Pennsylvania

May 1, 1984

Mr. Russell Muth, Jr.
66 Springs Drive
Doylestown, PA 18901

Dear Mr. Muth:

In compliance with your request of April 26, 1984, I am forwarding the enclosed additions to the original IEP developed on March 28, 1984 which address the areas of:

1. Adaptive physical education
2. Individual Tutorial services
3. Gifted program

I have also included a Notice of Recommended Assignment (NORA) with three (3) options for your consideration.

As indicated on the NORA, if you do not respond within 10 days, that action will indicate your approval of the program.

For your convenience, I have enclosed a self-addressed stamped envelope for the return of the NORA.

Sincerely,

/s/Charles M. Neill
Supervisor of
Special Education

CMN:je
Enclosures

cc: Mr. Vernard Trent
Mr. Thomas F.J. MacAniff
Ms. Joanne D. Sommer
Dr. N. Robert Laws
Mrs. Judith Tolson
Mrs. Joanne Leilich
Mr. Vince Talerico.

CENTRAL BUCKS
EXHIBIT 2

DUE PROCESS NOTES OF TESTIMONY OF JUNE 7, 1984

p. 3, l. 1-9

MR. TRENT: My name is Bernard Trent, and I am serving as the Hearing Officer and designee of the State Secretary of Education for The Commonwealth of Pennsylvania.

The purpose of this hearing is to resolve whether the Bucks County School District has offered an appropriate education program for Robert Alexander Muth and stated notice of assignment and I.E.P. of April of 1984.

p.8, l.7 - p. 9, l.15

MS. SOMMER: For the record, I would ask and move for the admission of the testimony of the December 30, 1983 hearing and ask that be incorporated

into this record, including all of the exhibits that were presented at that time.

MR. MUTH: Objection.

MR. TRENT: I am going to allow the admissions and that evidence and testimony because this is a continuation of that hearing.

MR. MUTH: May I state my objections more formally?

MR. TRENT: The objection is noted and is in the record.

At this time the School District may present anything it has in the way of evidence and testimony. You will then have an opportunity to do likewise, Mr. Muth.

MS. SOMMER: At this time we would like to present the I.E.P. which was presented to Mr. Muth. It includes the Individualized Education Program itself

in its present form which was developed on March 28, 1984.

It also includes the present education levels, the record of the test scores, as well as the 4/26/84 present educational level which reflects the meeting on April 26th with Mr. Muth. It also includes the cover sheet for the Individualized Education Program plan and a notice and recommended assignment which is dated April 26, 1984. It also includes a letter dated May 1, 1984, from Mr. Neill to Mr. Muth. Enclosed is an addition to the original I.E.P. developed on March 28th.

I would like to have this marked as SD-18 and have that made part of the record.

P. 35, l. 6 to p. 38, l. 1

BY MS. SOMMER:

Q. Ms. Tolson, what is your position with the Central Bucks School District?

A. Diagnostic Learning Consultant.

Q. Ms. Tolson, were you present at the March 28, 1984 planning meeting for an Individualized Education Program for Robert Alexander Muth?

A. yes.

Q. And also present at that time was Mr. Talerico?

A. Yes. Mr. Talerico and I went through the test data and classroom information and formulated a plan for Alex and presented it to the staff. And we were hoping for Mr. Muth's approval.

Q. What kind of test data did you receive?

A. I received my normal testing of the reading specialist at Lenape and psychological information that had been done.

Q. Including in the testing of Alex, was there an IQ test performed?

A. Yes, there was.

Q. And do you recall what the full scale IQ was?

A. The full scale IQ, I believe, was -- this is Mrs. Fallon's information and I don't have it with me right now. Oh, yes, I do.

The full scale IQ was 120.

Q. How is a full sccle arrived at?

A. It's arrived at by compiling the verbal scores and the performance scores. That's the WIS-R test.

Q. Do you recall when the WIS-R test was done?

A. Mrs. Fallon had done that testing February of 1982.

Q. And as of February of 1982 the full scale IQ was 120?

A. Yes, it was.

Q. Now, what other tests did you review?

A. We reviewed all of my testing that I had done in March of 1983 which was the most recent formal educational testing that had been done.

Q. Are your aware of the criteria in terms of IQ, a full scale IQ for the gifted program?

A. Yes.

Q. What is the criteria for the gifted program?

A. The full scale IQ is 130 plus as measured on that test.

Q. That's full scale?

A. Full scale, yes.

Q. Now, where you involved in the development of an Individualized Educational Program?

A. Yes, I was.

Q. In what way?

A. Mr. Talerico and I went through all of the information we had, and that included classroom performance and most recent information of the test data and we formulated a plan on his strengths and weaknesses.

And by doing so, we then decided on an objective for his I.E.P.

Q. Did you make a recommendation to the staff?

A. Yes. We suggested things that we felt would be appropriate for Alex.

Q. What kind of suggestions did you make?

A. Well, according to what information we had, we determined that

certain areas that would be appropriate on the basis of his strength and weakness, specific academic areas and from that formulated a plan.

Q. In what way was this I.E.P. different from the March of 1983 I.E.P.?

A. This I.E.P. also includes an aspect of creativity, areas of work habits that we wanted to develop with Alex.

It also includes science and social studies which was not included in the other I.E.P.

Q. What was the difference between the program that was in effect in March of 1983 and what would be proposed in the I.E.P. program of March of 1984?

A. This program was more self-contained than the other program.

P. 40, l.2 - p. 40, l.18

BY MR. MUTH:

Q. I believe the record has clearly demonstrated that the child has a very high performance IQ, indicating that he is in the gifted area.

Can you or can you not, develop a gifted program which addresses this particular child's uniqueness and/or giftedness?

A. I believe that was addressed in the I.E.P.

Q. Could you explain where?

A. The additions to the recommendations that you asked for.

MR. TRENT: Excuse me for interjecting again, but I believe she did say they discussed science and, I believe, social studies. So that the creative aspect was

addressed and then creativity, that addition to the I.E.P. that we had to the four additions that were also addressed.

P. 41, l. 16 - p. 42, l. 17

VINCENT TALERICO, having been duly sworn was examined and testified as follows:

- - - -

BY MS. SOMMERS

Q. Mr. Talerico, what is your position with the School District?

A. Special Education Teacher at the Lenape Junior School.

Q. When did you first become involved with Alex?

A. I believe it was in November of 1982.

Q. What was your involvement with him?

A. I saw Alex for reading and math approximately eight class periods during the week.

Q. You are a Special Education Teacher and you were his classroom teacher?

A. One of his classroom teachers.

Q. Did you have an opportunity to observe his program?

A. Yes.

Q. Did you also observe his classroom behavior?

A. Yes, I did. In the classroom Alex was, at times, very cooperative and very positive. But at other times he could be stubborn and negative. He had a great deal of difficulty at times

attending to the tasks even in small group instruction. He needed a great deal of one to one support. And often after a small group of three or four were instructed on something, Alex would receive additional one to one instruction, generally on the same material.

P. 50, l. 25 - p. 52, l. 2

Q. So that science and social studies were at the grade level of the student; is that correct?

A. The information presented is at the grade level of the student's ability. And I modify the materials to do more reenforcing exercises so that the students can learn the material.

There was a recommendation by the hearing officer's report which included

this particular topic, and we included this in our March 28th tentative plan. That's for creative development.

Q. What were the goals on creative development area?

A. The goal was to challenge Alex's cognitive creative skills.

Q. How did you plan on accomplishing this goal?

A. Using materials that are put out by Midwest Publications. There are certain areas of critical thinking and logic that I would use to challenge those areas.

I would create, develope a specific program on an individualized basis, especially in Alex's case.

Q. Why do you believe that the I.E.P. that was created in March of 1984 and was subsequently amended in April of 1984, was appropriate for Alexander?

A. Well, based on the test data and the classroom observations, I believed that the I.E.P. that we developed could easily meet Alex's needs, especially in the area of decoding and the mathematics area.

MS. SOMMER: That's all the questions I have of this witness.

P. 53, l. 16 - p. 55, l. 7

MR. TRENT: At this time, Mr. Muth, if you have any evidence that you would like to enter, or if you want to give testimony, you may do so.

MR. MUTH: Well, I think the best way for me to do so would be do to do it in the following manner: The child, Robert Alexander Muth, was removed from the Central Bucks School System on the advice of a physician. He was placed in

a private school, the Landmark School in Pride's Crossing, Massachusetts.

The child demonstrated none of the particular problems in the classroom that he experienced when he was in the Central Bucks School District. He is in a normal classroom setting which begins at eight o'clock in the morning and finishes at 3:30 in the afternoon.

And he moves from class to class just as normal students would move from class to class as they do here at Lenape. He has benefited from the extremely intense daily --

MS. SOMMER: I object to the intense, daily.

MR. TRENT: Overruled, I'll let him continue. Go ahead.

MR. MUTH: The intense, daily tutoring. He is also in a counseling program which is called a milieu

therapy. And the present psycho social study has helped to repair his narcissistic wound. This repair is taking place.

The premise that the School District has brought forth that the child is in need of a more restrictive setting, has been demonstrated at the Landmark School to be erroneous. The child is no longer in a supervised study hall, but studies on his own.

He has demonstrated no motivational difficulty with regard to dressing and functioning in the classroom.

As a matter of fact, the tests done by the teachers that I have spoken to both last fall and the spring of this year, have clearly indicated that the child is very highly motivated and has accomplished with minimum goading the educational work that you would expect

of a very highly intelligent 14-year old child.

p. 58, l. 17 to p. 59, l. 14

MS. SOMMER: Now, the Landmark School is a school specifically for children with learning disabilities; is that correct?

A. Yes, with gifted potential.

Q. So that when you said he is in a normal classroom setting, you are referring to a normal classroom setting within a school specifically for learning disabled children?

A. I think that would be an appropriate way of looking at it.

MS. SOMMER: I have no further questions.

MR. TRENT: Ms. Sommer, you may give your closing statement.

MS. SOMMER: I'll be very brief. The School District submits it has been and is prepared to provide Robert Alexander Muth not only with a program that is appropriate for him, but a program that will deal with his unique needs in terms of an annual goal, in terms of short term objectives. And we intend to utilize the facilities that we have to see that those objectives are carried out. We have responded appropriately to the concern of the parents. We believe that the I.E.P. plan which was revised as of April 25, 1984, should be declared to be an appropriate program for Robert Alexander Muth.

PLAINTIFF'S
EXHIBIT 3

Due Process Hearing

June 7, 1984

10:00 A.M.

FOR

ROBERT ALEXANDER MUTH

A hearing in the above entitled matter was continued from September 30, 1983 on the above date at the Central Bucks Administration Building, Route 202, Doylestown, Pennsylvania

BEFORE: Vernard Trent
Hearing Officer

Date of Decision: July 25, 1984

HEARING OFFICER'S REPORT

1. Names and Functions of Those Attending the Hearing:

The names of those attending the hearing are listed on page two (2) of the transcript.

2. List of Exhibits:

Exhibits are listed on page (2) of the transcript.

3. Background of Hearing and Terse Statement of the Position of Each Side

On the 23rd day of January 1984, the Secretary of Education remanded the above matter "to the hearing officer for further proceedings." The case was originally heard on September 30, 1983.

Mr. Muth's position is that the district I.E.P. (4/26/84) is not appropriate for it "is simply the same as the present I.E.P. that was applied previously and it did not work" (N.T. p. 7). Further, he felt his constitutional rights were violated. (N.T. p. 5).

The Central Bucks School District contends that the I.E.P. was revised in accordance with the mandate of the Secretary of Education and the hearing officer. With the present revisions an appropriate program is being offered for Alexander Muth (N.T. p. 6).

4. Issues to be Resolved:

The purpose of this hearing is to resolve whether the Central Bucks School District has offered an appropriate educational program for Robert Alexander as stated in the NORA - Notice of

Recommendation Assignment and revised I.E.P. of April 1984.

5. Evidence Presented by the Parties:

A. School District Evidence

The district submitted as evidence on April 26, 1984 I.E.P. as well as testimony from the September 30, 1983 hearing (N.T. p. 8 & 9). This was followed by a chronology of district contacts with Mr. Muth to secure records from the Landmark School and to discuss revisions in the I.E.P. The I.E.P. conference was held on April 26, 1984 at 6 A.M. at Mr. Muth's request (N.T. pp. 11-17). Mr. Muth disapproved of the NORA and I.E.P. (SD-28) and raised specific objections which were later addressed by the school district (N.T. p. 19, SD-18, N.T. pp. 26-29, 32, 37, 42 and 43).

B. Parent's Evidence

Mr. Muth did not submit evidence for the record but made specific statements and declarations. (N.T. pp. 53-55).

6. Uncontested Facts

That Alexander is a learning disabled student experiencing auditory perceptual dysfunction (SD-18) and citations in section seven (7) of the September 30, 1984 hearing.

7. Findings of Fact

The following adjustments were made to the 3/28/84 and 4/26/84 I.E.P.; provisions for adaptive physical education, individual tutorial services and evaluation to determine eligibility for the mentally gifted program in accordance with state standards (SD-18). A more restrictive (self contained) LD program with mainstreaming where appropriate was offered (N.T. p. 44).

8. Conclusions of Law

The conclusions of law delineated in the September 30, 1983 hearing remain intact with the following exception; the adjustments to the I.E.P now coalesce to indicate an educational program (SD-18) which appears to be effective and efficient as required by 22 Pa. Code Ch-13.11(a)(b). The efficacy of this program will have to be tested by Alexander's matriculation in said program to determine its benefits. It does, however, provide basic access. Finally, the district has complied with all procedures related to due process according to 22 Pa. Code 13.21. and 13.31 (SD-18).

9. Recommendations:

1) The district in good faith made substantial adjustments (SD-18) to the I.E.P. and program offered for R.

Alexander Muth. These adjustments now describe an appropriate program of special education for this learning disabled student. Therefore, it is recommended that the school district's program be accepted and implemented as written.

2) Since education is statutory and not constitutional, school codes govern and not necessarily the constitution. Therefore, the parents exceptions should be dismissed.

DATED: July 25, 1984

HEARING OFFICER: Vernard Trent

CENTRAL BUCKS
EXHIBIT 3

Deposition Notes of Testimony of Judith Tolson, July 21, 1986

JUDITH TOLSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SOMMER:

Q. Mrs. Tolson, by whom are you employed?

A. The Bucks County Intermediate Unit.

Q. In what capacity?

A. Diagnostic Learning Consultant.

...

p. 3, l. 8 to p. 13, l. 2

Q. Do you know Alexander Muth?

A. Yes, I do.

Q. When did you first come into contact with Alexander?

A. March of 1983.

Q. What was that contact?

A. I was called to evaluate Alex's academic strengths and weaknesses.

Q. Since march of 1983, have you been involved in reviewing Alexander's record and testing information to prepare an Individualized Educational Program for the 1986-87 school year?

A. Yes, I have.

Q. What was your participation?

A. I was asked to review all information and decide on an educational level.

Q. In connection with your review of the record, I show you a document that we will mark Tolson-1.

(Tolson-1, SRA Skill Profile, marked for the purpose of identification.)

BY MS. SOMMER:

Q. Can you identify Tolson-1?

A. Yes, I can.

Q. What is that?

A. A test profile of the SRA Skill Profile. It's an individualized test given to Robert Muth at the Wyncote Academy.

Q. When you refer to Robert Muth, are you referring to Robert Alexander Muth?

A. Yes, I am.

Q. Did you review that document in connection with your determination of a present educational level of Robert Alexander Muth?

A. Yes, I did.

(Tolson-2, Letter dated April 10, 1984, marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document which we have marke Tolson-2. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a testing profile of the Landmark School of Robert Muth at the time of his entrance, I believe.

Q. Does the test contain the results from Landmark Academy of September of 1983 and April of 1984?

A. Yes, It does.

Q. Contained in Tolson-2, is there a Fullerton test, showing the test results?

A. Yes, there is.

Q. Is there a Stanford Achievement Test and the test results?

A. Yes, there is.

Q. Is there a document identified as the Testing Profile?

A. Yes.

Q. That contained information about the Gray, G-R-A-Y, Oral Reading Paragraphs and the Slosson Oral Reading Test?

A. Yes.

Q. Does it also contain an evaluation of the Stanford Spelling Test?

A. Yes.

Q. The next page contains a document identified as Expressive One-Word Picture Vocabulary Test?

A. Yes.

Q. Are you familiar with that document?

A. Yes, I am.

Q. You also reviewed this in connection with your review of his records?

A. Yes.

Q. The next document is entitled "Admissions Testing" with the date of the test being as September 12, 1983. It is a five page document.

Did you have occasion to review the Admissions Testing Report?

A. Yes, I did.

Q. In addition to the Wyncote Academy test results, the documents identified as Tolson-2, did you have occasion to review an Individualized Educational Plan?

A. Yes, I did.

(Tolson-3, Individualized Educational Plan, marked for the purpose of identification.)

BY MS. SOMMER:

Q. Now, I show you a document which has been marked Tolson-3 for identification. Do you recognize that document?

A. Yes, I do.

Q. What is that document?

A. An Individualized Educational Plan from the Landmark School.

Q. What period is covered in the Individualized Educational Plan?

A. From September of 1984 through June of 1985.

Q. Is it from 9/12/84 to 6/15/85?

A. Yes.

Q. Did you review all of the documentation contained in the Individualized Educational Plan?

A. Yes, I did.

Q. That's a nine page document; is that correct?

A. That's correct.

(Tolson-4, Psychological Evaluation, marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document which I marked Tolson-4 for identification.

Can you identify this document?

A. Yes.

Q. What is that document?

A. That's a report from Dr. Atkins.

What is the date on the report?

A. 5/13/85.

Q. Did you review this document from Dr. Atkins?

A. Yes, I did.

Q. That's a four page report,; is that correct?

A. That's correct.

Q. Do you recall whether or not you had reviewed any other documentation?

A. I am not aware of any at this point.

Q. What were you looking for when you reviewed these documents?

A. I was looking to see where the present educational level or where Alexander could function at the time of those documents. I was looking to see what kind of programs they had designed for him and whether it was different from our program. Whether they had

discovered anything that we had not discovered or whether he had made significant gain or lost any ground in his educational development.

Q. When did you review the documents?

A. In February of this year, 1986.

Q. At the time you reviewed the documents, did you have any information about all of the projected academic program for the school year 1985-86?

A. No, I did not.

(Tolson-5, document entitled "Present Education Levels", marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document that we have marked Tolson-5 for identification. Can you identify this document?

A. Yes, I can.

Q. What is it?

A. It is a Present Educational Levels pages of the IEP that we wrote in February of 1986.

Q. Now, did you prepare these Present Educational Levels, which is a two page document?

A. Yes, I did.

Q. Can you tell me, from reviewing the records of the Landmark Academy and the Wyncote Academy and Dr. Atkins' psychological evaluation, whether you formed any opinion as to Alexander's educational levels as of 1985?

A. Yes, I did.

Q. What were those opinions?

A. The particular levels that he was functioning at that time, his specific academic strengths and weaknesses in reading, math, spelling,

written language and writing, basically, his learning style.

Q. Does the Present Educational Levels page identified as Tolson-5 reflect your opinion on Robert's academic levels as of the time that you prepared it?

A. Yes, they do.

Q. Now, you mentioned that you don't have the 1985-86 records. Could your educational levels change and your opinion change depending on the information that would be contained in those records?

A. Yes.

Q. After preparing the Present Educational Levels, did you have an opportunity to discuss these levels with another member of the team?

A. Yes, I did.

Q. And what was the focus of your discussion?

A. Well, from what we have, we decided where his present educational levels are and from all of the information that we have, it was our intention to design a program for him with that information.

Q. Do you know whether or not a program has been finalized, or a prepared finalized program has been prepared for the upcoming school year, 1986-87?

A. I don't know.

Q. You mentioned you had previously tested Alex while he was in the Central Bucks School District.

A. Yes.

Q. Did you have occasion to compare the results of the testing that we had done in the Central Bucks School District with the testing that was done by Landmark and Wyncote Academies?

A. Yes, I did.

Q. Specifically, what were the comparisions?

A. I wanted to see what his longitudinal gains had been in reading, math, spelling particularly. So what I did, I looked at the Wide Range Achievement Test. We ordered that testing in 1980 and then again in 1985. I compared those scores to see the amount of gain Alex had made over the time period.

Q. Now, when was the first Wide Range Achievement Test given?

A. In 1980. Again, three in 1981, two in 1982 and then the time it was given by Dr. Atkins in five of 1985.

Q. Now, could you describe for us the changes in achievement levels between the time it was first given in three of 1980 and the time it was last given while at Central Bucks School in two of 1982?

A. Between that time in reading he went from a grade score, a grade equivalent 2.0 to grade equivalent 3.8.

Then he went from a grade equivalent score of 1.9 to a grande equivalent score of 2.5. In arithmetic he went from a 3.5 grade level to a 4.1 grade level.

Q. What does this represent in terms of growth?

A. Well, in reading he grew approximately a year and one-half. In spelling, a little less than that, I guess it would be about a half a year. In arithmetic he gained almost a full year, slightly less, a few months less than a year.

Q. That was between 1980 and 1982?

A. That's correct.

Q. Between 1982 and 1985, what were the changes in the scores?

A. Dr. Atkins' test results were, in reading he scored -- two of 1982, a 3.8. Dr. Atkins found him at a beginning five. In spelling he scored for us a 2.5. Dr. Atkins found him at the third grade level. In arithmetic he was at 4.1 and for Dr. Atkins it was the sixth grade level.

Q. That was in approximately three years time; is that correct?

A. That's correct.

Q. What were the changes between two of 1982 and five of 1985?

A. In reading it was slightly over a year. In spelling it was about a half a year. In arithmetic it was almost two years.

Q. Did you also have an opportunity to review the goals that had been established for Alexander for the 1983-84 school year in the Central Bucks School District with the goals that were established for the 1984-85 school year at Landmark?

A. Yes, I did.

Q. Could you tell me what observations you made, what comparisons were made?

A. I wanted to compare exactly what the goals were, what the strengths and weaknesses were, what kind of program they were designing for us.

In our IEP in 1983-84, we had strengths in reading that contained a systematic method of decoding words. I noticed that their IEP also reflected the same goal, comprehension was the same, that he learned to find the main ideas and read for detail language. It was also the same as we had. We had seen that he had needed help in oral and written receptive expressive language skills. That continued on also.

We recognized that he had a problem studying, note taking and test taking. It's also reflected in their IEP and that was a goal for him too.

Math, basic computation operations was difficult for him and in 1983-84 continued to be difficult. Landmark had recognized that also.

And written, basically the same thing.

MS. SOMMERS: I have no other questions. Cross examine.

CROSS EXAMINATION

...

p. 16, l. 4 to p. 17, l. 14.

BY MR. BOGIN:

Q. Now, do you remember testifying about the Fullerton test?

A. No.

Q. Do you happen to have that in front of you?

A. I don't have the exhibit number.

MS. SOMMER: I believe it's exhibit Tolson-2. It was in the Landmark, exhibit two.

BY MR. BOGIN:

Q. What does the Fullerton test measure?

A. That's a language test as I understand. I was not familiar with the test at all. I went to the Intermediate Unit and spoke with the speech language people to ask them about the test. It's not a very well known test. They only gave me some information, so that I am really not well versed in that test at

all. When I say it's not very well known, I mean by our people. That's the Intermediate people. I can't speak for the Central Bucks people, but the Intermediate people.

Q. Well, was it an achievement test, or is it sympton and aptitude?

A. It seems to be a language based test on his expressive and retentive language.

Q. Would you agree that Alexander has some severe language disabilities?

A. Yes.

Q. Would you say that's his greatest or his most severe learning disability?

A. If you include reading, yes.

Q. Is it your opinion that his disability in reading is as a result of his language disability or is that independent from that?

A. I think it's just part of it. I think he also has processing difficulty, too.

Q. All in the verbal area though?

A. It seems to be, yes.

Q. Because in the non-verbal area he is very bright?

A. In the non-verbal area he is very bright, yes.

CENTRAL BUCKS
EXHIBIT 9

486a

CENTRAL BUCKS SCHOOL DISTRICT

Administration Center
315 West State Street
Doylestown, PA. 18901
(215) 345-1400

MULTIDISCIPLINARY TEAM REPORT

Name: Robert A. Muth ( ) Initial Evaluation _____ (date)

Birthdate: 3/11/70 ( ) Reevaluation: _____ (date)

School: C. B. East High School Grade: ~~xxxxxx~~ 11th

It is the recommendation of this team that appropriate educational programming for the above-named student can best be provided through:

Placement in: _____

Continued placement in: _____

Change of placement to: LD Classroom for major subjects. Vocational-technical school for one-half day, or elective subjects.

Reevaluation after additional data/evaluations have been completed _____

(X) Psychological Evaluation ( ) Educational Evaluation
( ) Home Visitation ( ) Parent Conference
( ) Other _____

Comment: Based upon available data, Robert would benefit from a half day program in the Learning Disabilities Classroom. This would be in a regular education high school where he would have the opportunity to attend the area vo-tech school.

* Signatures of Participants:

_____ Regular Educator (initial evaluation only)

_____ Student's Special Educator

Kathleen A. Kelsic PA. Certified Psychologist

_____ Principal

_____ Counselor

_____ Special Education Supervisor

_____ Diagnostic & Learning Consultant

_____ Director Pupil Personnel

*Team member (s) who wish to register a dissenting opinion should do so by attaching a statement to this form.

Distribution: White - Special Education Office Yellow - Child's Record Pink - Special Education Teacher Goldenrod - Psychologist

Date August 11, 1986

School District Central Bucks

PLACEMENT OPTIONS

Section 13.32 of STATE BOARD OF EDUCATION REGULATIONS requires the NOTICE OF RECOMMENDED ASSIGNMENT include a list of educational placement options considered and the reasons why these alternatives were not recommended.

Listed below are the educational assignments considered for your child, and the reasons each placement was found inappropriate.

1. Placement Option (specify): Regular Education

   This placement was considered but found inappropriate because:
   - [X] this placement does not meet the student's learning needs
   - [ ] this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
   - [ ] other (explain) _____

2. Placement Option (specify): Private School

   This placement was considered but found inappropriate because:
   - [ ] this placement does not meet the student's learning needs
   - [X] this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
   - [ ] other (explain) _____

3. Placement Option (specify): _____

   This placement was considered but found inappropriate because:
   - [ ] this placement does not meet the student's learning needs
   - [ ] this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
   - [ ] other (explain) _____

INDIVIDUALIZED EDUCATION PROGRAM PLAN

Student's Name: Robert A. Muth

Grade/Program: 11th/Learning Disabilities

Birth Date: 3/11/70

Teacher(s): L. Greene/G. Stemplewicz

Present Date:

District/School: Central Bucks/C.B. East High School

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
Grade 11 with L.D. classroom	September, 1986		not at this time

Extent to which the child will participate in regular education: Homeroom everyday. Health and physical education, two periods per week. Extra curricular activities are available at Robert's discretion. Elective subjects as set forth in the 1986-87 course selection guide or half day attendance at the area vocational technical school.

Services:

Physical Education/Adaptive physical education, if appropriate.			
Transportation/regular			
Academic and social counseling			
Evaluation for Gifted program			

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	Dr. N. Robert Laws
Parent, Guardian or Surrogate Parent:	
Teachers(s):	

Date for review and/or revision of the Individualized Education Program Plan: within six months of beginning of program.

FINDINGS OF FACT, DISCUSSION,
CONCLUSION OF LAW AND ORDER
OF AUGUST 28, 1988

[Located in Petition Appendix p. 112a]

OPINION OF THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT
JANUARY 29, 1988

[Located in Petition Appendix p. 1a]

(10)

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

LeRoy S. Zimmerman
Attorney General

Maria Parisi Vickers
Chief Deputy Attorney General
Chief, Eastern Region
Counsel of Record

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

Gregory R. Neuhauser
Senior Deputy Attorney General

Attorneys for Petitioner

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

10 5 PM

QUESTIONS PRESENTED

1. Whether the Education for All Handicapped Children Act, which makes no mention of the Eleventh Amendment and does not refer to State liability, thus fails to contain the requisite unmistakable expression of Congressional intent needed to abrogate the Eleventh Amendment immunity of the States?

2. Whether Pennsylvania's Secretary of Education, a cabinet member and chief executive officer of the Department of Education, should be precluded from deciding special education administrative appeals under the Act?

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	4
STATUTORY PROVISIONS INVOLVED..	6
STATEMENT OF THE CASE	11
SUMMARY OF ARGUMENT	24
ARGUMENT	
I. CONGRESS DID NOT ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY WHEN IT ENACTED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT	27
II. THE EHA DOES NOT PRECLUDE REVIEW OF DUE PROCESS HEARINGS BY A CHIEF EXECUTIVE OFFICER OF THE STATE AGENCY WHEN THE STATE AGENCY IS NOT INVOLVED IN THE DEVELOPMENT OF THE INDIVIDUALIZED EDUCATION PROGRAM ...	58
CONCLUSION	93

TABLE OF AUTHORITIES

CASES	PAGE
Alabama v. Pugh, 438 U.S. 781 (1978)	28
Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985)	passim.
Brandon E. v. Wisconsin Dept. of Public Instruction, 595 F.Supp. 740 (E.D. Wisc. 1984)	87
Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985)	54, 58, 59 60
Cain v. Yukon Public School District, 775 F.2d 15 (10th Cir. 1985).....	87
Carey v. Piphus, 435 U.S. 247 (1978)	55, 56
Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983)..	87

PAGE

David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985) cert. denied, 475 U.S. 1140 (1986) 39, 40

Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), affirmed on other grounds sub nom. Honig v. Doe, No. 86-728 (Jan. 20, 1988) 41

Dugan v. Rank, 372 U.S. 609 (1963) 29

Edelman v. Jordan, 415 U.S. 651 (1974) 27, 28, 29, 31

Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1973) 27, 31

Ex parte Young, 209 U.S. 123 (1908) 44, 54

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 30

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985) 35, 36

PAGE

Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986) .. 41

Goldberg v. Kelly, 397 U.S. 254 (1970) 74

Green v. Mansour, 474 U.S. 64 (1985) 44

Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) .. 87

Hans v. Louisiana, 134 U.S. 1 (1890) 27

Helms v. McDonald, 647 F.2d 800 (5th Cir. 1981), cert. denied 455 U.S. 946 (1982) 87

Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176 (1982) 58, 59, 65
84

Hensley v. Eckerhart, 461 U.S.C. 424 (1983) 22

Honig v. Doe, No. 86-728 (Jan. 20, 1988)... 41, 58, 60

Hortonville Joint School Dist. No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482 (1976) 73

PAGE

Hutto v. Finney,
437 U.S. 678 (1978) 46

Mayson by Mayson v. Teague,
749 F.2d 652
(11th Cir. 1984) 87

Miener v. State of Missouri,
673 F.2d 969 (8th Cir.
1982), cert. denied,
459 U.S. 909 (1983) 41

Mills v. Board of Education
of District of Columbia,
348 F.Supp. 866 (D.C. 1972).. 59, 72

Parden v. Terminal Ry. Co.,
377 U.S. 184 (1964) 27

Pennhurst State School
and Hospital v. Halderman,
465 U.S. 89 (1984) 27, 28,
29, 91

Pennsylvania Association
for Retarded Children v.
Commonwealth of Pennsylvania,
343 F.Supp. 279
(E.D. Pa. 1971) and
343 F.Supp. 1257
(E.D. Pa. 1972) ..... passim.

Quern v. Jordan,
440 U.S. 332 (1979) 25, 31,
33

PAGE

Reitel v. Sonotone Corp.,
442 U.S. 330 (1979) 69

Robert M. v. Benton,
634 F.2d 1139
(8th Cir. 1980) 87

Smith v. Robinson,
468 U.S. 992 (1984) 58, 59

United States v. Morgan,
313 U.S. 409 (1941) 73

Victoria L. by Carol A. v.
District School Board,
741 F.2d 369
(11th Cir. 1984)..... 87

Vogel v. School Board of
Montrose,
491 F.Supp. 989
(W.D. Mo. 1980) 87

Wood v. Strickland,
420 U.S. 308 (1975) 45

CONSTITUTIONAL PROVISIONS PAGE

U.S. Const. Amend. XI ..... passim.

U.S. Const. Amend. XIV,
Sec. 1 5

Sec. 5 ..... 5, 30

FEDERAL STATUTES AND REGULATIONS	PAGE
Education for All Handicapped Children Act of 1975, P.L. No. 74-172, 20 U.S.C. §§1400-1461	passim.
20 U.S.C. §1400(b)(9)	6, 37, 50
20 U.S.C. §1412(6)	79
20 U.S.C. §1413	80
20 U.S.C. §1413(a)(3)(A)	81
20 U.S.C. §1413(a)(3)(B)	81
20 U.S.C. §1414(b)	81
20 U.S.C. §1414(b)(2)(A)(i) ...	81
20 U.S.C. §1414(b)(3)	83
20 U.S.C. §1414(d)	72, 82
20 U.S.C. §1415(a)	6
20 U.S.C. §1415(b)	82
20 U.S.C. §1415(b)(1)	7
20 U.S.C. §1415(b)(2)	8, 61, 69, 70
20 U.S.C. §1415(c)	8, 62
20 U.S.C. §1416	53

PAGE

Handicapped Children's Protection Act, Pub. L. 99-372, 100 Stat. 796 (1986) codified at

20 U.S.C. §1415(e) 38

20 U.S.C. §1415(e)(2) 9, 37

20 U.S.C. §1415(e)(4)(G) 10, 38, 43

Rehabilitation Act of 1973 (§504)

29 U.S.C. §794 ..... 15, 34

29 U.S.C. §794a(b) 46

Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1807 (1986)

42 U.S.C. §2000d-7 ..... 47, 48

42 U.S.C. §1983 ..... 15, 31, 46

42 U.S.C. §1988 ..... 45, 46

28 U.S.C. §1254(1) 3

34 C.F.R. §300.507 63

STATE STATUTES	PAGE
24 P.S. §9-952	74
24 P.S. §13-1371	51
42 Pa.Cons.Stat. §8521(b)	28
71 P.S. §67.1(d)(1)	64

MISCELLANEOUS	PAGE
3 K. Davis, Administrative Law Treatise §19:2, at 372 (2d ed, 1980)	74
1 Koch, Administrative Law and Practice §6.7, at 439 (1980)	74
S. Conf. Rep. No. 94-455, 94th Cong. 1st Sess. 47, reprinted in 1975 U.S. Code Cong. & Ad. News 1470	63
S. Conf. Rep. No. 94-455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code Cong. & Ad. News 1480, 1502	88
S. Conf. Rep. No. 94-168, 94th Cong., 2d Sess. 29, 47, reprinted in 1975 U.S. Code Cong. & Ad. News 1425, 1453, 1470	80, 91

PAGE

United States Department of Education Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act 45 (1982) 78

United States Department of Education Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act, 75 (1987) 77

NO. 87-1855

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 839 F.2d 1133 (3d Cir. 1988) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 1a).

The District Court opinion of June 2, 1986 is reported at 646 F.Supp. 280 (E.D. Pa. 1986) and may be found in the appendix to the petition for writ of certiorari. (Pet. App. 83a).

The District Court opinion of August 28, 1986 has not been reported but may be found in the appendix to the petition for writ of certiorari. (Pet. App. 112a).

The District Court opinion of February 20, 1987 has not been reported but may be found in the appendix to the petition for writ of certiorari. (Pet. App. 191a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals was filed on January 29, 1988. (Pet. App. 1a) and the petition for certiorari was filed within ninety days thereafter. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

> or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> ...

U.S. Const. Amend. XIV, Sec. 1.

> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Amend. XIV, Sec. 5.

STATUTORY PROVISIONS INVOLVED

20 U.S.C. §1400. Congressional Statements and Declarations

...

(b) Findings

The Congress finds that -

...

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

§1415. Procedural Safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under

this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to -

...

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

20 U.S.C. §1415(b)

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

20 U.S.C. §1415(e)

Civil action; jurisdiction; attorneys fees

...

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

20 U.S.C. §1415(e)

...

(4)(G) The provisions of subparagraph (F) [describing situations when the court shall reduce attorneys fees awarded under this section] shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

STATEMENT OF THE CASE

1. This case arises out of a dispute over the appropriate educational program for a gifted handicapped child. Respondent Russell A. Muth, Jr., alleged that his son, Robert Alexander Muth (Alexander), was denied a "free, appropriate public education" in violation of the Education for All Handicapped Children Act of 1975, Pub. L. No. 94-172, codified at 20 U.S.C. §§1400-1461, (the "Act" or "EHA"). (Pet. App. 141a).

The defendants were the Pennsylvania Secretary of Education,[1] the Central Bucks (Pennsylvania) School District,

---

[1]The original defendant was Secretary Robert C. Wilburn, sued only in his official capacity. His current successor in office is Thomas K. Gilhool, the petitioner in this Court.

and Dr. Thomas L. Newman, Superintendent of the School District. (School District defendants) (Pet. App. 1a-8a).

2. Alexander, already diagnosed as learning disabled, first enrolled in the Central Bucks School District in 1980 where an individualized educational program (IEP) placed him in a learning disability resource room for some subjects and "mainstreamed," or placed him in regular classes, for other subjects. Changes in Alexander's IEP were made with his father's participation and approval until June of 1983, when the School District proposed placing Alexander in the learning disabled classroom setting for all substantive subjects in the 1983-84 school year. (Pet. App. 9a-11a).

Muth disagreed with the School District's proposal, requested a due process hearing and requested that no change be made in Alexander's current placement until a hearing was held. In September 1983, Muth enrolled Alexander in a private school in Massachusetts for learning disabled students.[2] (Pet. App. 13a).

The due process hearing was held on September 30, 1983 before an impartial hearing officer who, on October 31, 1983

---

[2]Alexander remained at that private school until April 1985 when he was transferred by his father to Wyncote Academy, a private school in Pennsylvania with no special education program. At the beginning of the academic year 1986-87, Alexander returned to the Central Bucks School District. (Pet. App. 134a-135a)

made recommendations which included changes in the IEP proposed by the School District but did not order that Alexander be placed in a private school as Muth had requested. Both Muth and the School District appealed the hearing officer's decision to the Secretary of Education who remanded the case to the hearing officer with instructions to the School District to revise the IEP. The revised IEP was presented to the hearing officer, but Muth raised objections and on July 25, 1984 the hearing officer decided that the modified IEP was an appropriate program of Education for Alexander.

Muth appealed to the Secretary and on October 24, 1984 the Secretary affirmed the hearing officer's decision. While these administrative proceedings were underway, on April 27,

1984, Muth filed suit in federal district court. (Pet. App. 13a-17a).

3. In the District Court, Muth claimed that Alexander was denied a "free, appropriate public education" in violation of the EHA, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("§ 504") and 42 U.S.C. § 1983. Muth sought reimbursement for his son's tuition for the private school placement he claimed was the suitable placement for his child. (J. App. 11-13, 35). Thereafter, on March 21, 1985, Muth sought and was granted leave to file an amended complaint in which he dropped the claims pursuant to § 504 and § 1983. (J. App. 6, 39). In response to the Secretary's motion for summary judgment, the District Court held that the Eleventh Amendment barred Muth's claim for retroactive monetary relief against the Secretary but left open the

question of whether injunctive relief would be appropriate. (J. App. 50-51).) Muth was then permitted to file a second amended complaint in which the District Court allowed him to raise two issues against the Secretary: (1) whether the Secretary's involvement in the due process hearing violated Muth's due process rights under the EHA;[3] and (2) whether the delays in the due process procedure violated plaintiff's rights under the EHA. The District Court did not permit Muth to raise damage claims based on the Fourteenth Amendment and expressly precluded a claim which sought tuition reimbursement from the State (J. App. 80-82). The second amended complaint also

---

[3]Muth raised this issue for the first time in the second amended complaint.

named the School District defendants who were alleged to have denied Alexander a free appropriate public education in violation of the EHA. The relief sought encompassed declaratory and injunctive relief, reimbursement for private school placement and attorney's fees. (J. App. 100-101).

By memorandum opinion and order of June 2, 1986, the District Court held that Pennsylvania's statutory scheme for providing parents of handicapped children with administrative process violates the provisions of the EHA. More specifically, the District Court held:

> (1) that Pennsylvania's initial hearing and review are both conducted at the state level in contravention of federal law, (Pet. App. 90a-95a);

(2) that even if the initial hearing were a local one, a remand by the Secretary to the hearing officer violates the finality requirement of federal law, (Pet. App. 102a-104a); and

(3) that because the Secretary must be considered an employee of Pennsylvania's state educational agency, he is an improper reviewing officer under federal law. (Pet. App. 101a-102a).

The District Court did not resolve the issue of tuition reimbursement, stating that it would hold a hearing to determine whether the IEP which the School District had proposed would have provided Alexander with an appropriate free education. (Pet. App. 108a). Prior to trial, the District Court advised the Secretary that it would reconsider whether the Eleventh

Amendment presents a jurisdictional bar to an award of money damages against the Secretary, and invited submission of a trial brief on that issue.[4] (Pet. App. 168-169).

4. After a bench trial, the District Court issued an opinion and order on August 28, 1986, holding that the IEP prepared by the School District for the 1983-84 school year would have afforded Alexander an appropriate education. (Pet. App. 156a) However, in light of the procedural violations previously found, and without any finding of substantive due process deprivations, the District Court held

---

[4]In effect, the District Court thus modified its previous ruling and permitted an amendment to the second amended complaint, to allow Muth to raise a money damage claim against the Secretary.

that Muth was entitled to reimbursement for one year's private school expenses for his handicapped child. (Pet. App. 166a). While acknowledging that the School District was prepared, in September 1983, to provide Alexander an appropriate education, the District Court nonetheless found that the 10 month delay caused by the Secretary's remand precluded Muth (1) from participating in the process which directly affected his son's education, (Pet. App. 165a), and (2) from reevaluating (in December 1983 rather than in October 1984) the wisdom of Alexander's private school placement. (Pet. App. 166a). Consequently, the District Court held that the appropriate remedy was reimbursement for one full year of tuition at the private school.

The District Court further held that the EHA abrogated the Eleventh Amendment immunity of the states; consequently, the Secretary, sued in his official capacity, was found to be jointly and severally liable with the School District for the reimbursement award made to Muth. (Pet. App. 174a-177a; 187a-188a). In an opinion filed on February 20, 1986, the District Court awarded Muth attorney's fees to be paid jointly by the Secretary and the School District. (Pet. App. 210a-212a).

5. The parties cross-appealed to the Court of Appeals for the Third Circuit, which affirmed the judgment of the District Court on every issue except

its award of attorneys' fees. [Pet. App. 4a-5a].[5] That issue was remanded to the District Court for allocation of fees in accordance with Hensley v. Eckerhart, 461 U.S. 424 (1983). [Pet. App. 81a-82a].

---

[5]The Court of Appeals saw no need to reach the issue of whether Pennsylvania's two-step hearing and review procedure conforms to federal law. (Pet. App. 52a-58a). Therefore, a reversal by this Court on the issue of the Secretary's participation in the administrative review procedure will require a remand to the Court of Appeals for a decision on that unaddressed issue.

The Secretary's petition for rehearing en banc was denied. He sought and was granted review from this Court on the issues of the Eleventh Amendment and the bar to his hearing special education appeals under the EHA. The Secretary's petition for writ of certiorari was granted on October 3, 1988.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that by enacting the EHA pursuant to Section 5 of the Fourteenth Amendment, Congress abrograted the sovereign immunity of the States as it is constitutionalized by the Eleventh Amendment. Such abrogation is possible, but only when Congress makes "its intention unmistakably clear in the language of the statute," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). There is no clear language in the EHA, or the 1986 amendment upon which the Court of Appeals also relies, which even suggests that Congress considered eliminating the States' immunity from suit in federal court.

2. The principle of federalism which this Court repeatedly has recognized demands that Congressional

intent to subject States to suit in federal court be clearly articulated, even when Congress legislates to guarantee constitutionally protected rights. Quern v. Jordan, 440 U.S. 332 (1979).

3. The clear Congressional intent, which has been misunderstood by the Court of Appeals, is that the EHA be a cooperative effort between the States and the Federal Government. The purpose of this joint effort is the education of handicapped children. Exposing the States to money damage awards for some misjudgment in the placement of a child or for a procedural due process violation defeats the goals of the statute by depleting the very funds that States can use for the education of handicapped youngsters.

4. The Court of Appeals also erred by holding that the EHA's due process hearing procedure precludes Pennsylvania's Secretary of Education from acting as an impartial reviewing officer because he is the employee of an agency "involved in the education of the child."

Under this view, the Secretary is involved in the education of every child in Pennsylvania simply because he is the responsible supervisor of the entire educational system in the State. This interpretation of the statutory language is at odds with the expressed goal of the EHA to make the Secretary responsible for the delivery of educational services to the handicapped; moreover, it is contrary to traditional concepts of impartial decision making.

I. CONGRESS DID NOT ABROGATE THE STATES' ELEVENTH AMENDMENT IMMUNITY WHEN IT ENACTED THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

In a long line of cases, this Court consistently has interpreted the Eleventh Amendment as constitionalizing the principle of state sovereign immunity, thus precluding suits against a State in federal court by citizens of that State or other States. Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984); Edelman v. Jordan, 415 U.S. 651, (1974); Employees of Department of Public Health and Welfare v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1973); Parden v. Terminal Ry. Co., 377 U.S. 184 (1964); Hans v. Louisiana, 134 U.S. 1 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman v. Jordan, as well as suits seeking equitable relief, Pennhurst, 465 U.S. at 100-101; Alabama v. Pugh, 438 U.S. 781 (1978). A State may consent to suit against it in federal court, thereby waiving its immunity, but Pennsylvania has specifically withheld consent. 42 Pa.Cons.Stat. §8521(b), Pennhurst, 465 U.S. at 103 n. 12. In the absence of consent, a suit against the State or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 465 U.S. at 100.

Moreover, the Eleventh Amendment is a complete bar to suit against a state official who is sued, as the petitioner is sued here, in his official capacity, regardless of whether the suit seeks

damages or injunctive relief. Dugan v. Rank, 372 U.S. 609 (1963); Pennhurst, 465 U.S. at 100-103.

Although this Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 465 U.S. at 104 n. 13,[6] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. at 666-667.

---

[6]Edelman v. Jordan, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

A. In this case, the Court of Appeals for the Third Circuit has misapplied the decisions of this Court when it held that Congress, by enacting the EHA pursuant to §5 of the Fourteenth Amendment, has abrogated the States' Eleventh Amendment immunity to suit. (Pet. App. 71a-72a). The Secretary concedes that Congress has the power to abrogate the States' Eleventh Amendment immunity without the States' consent when it legislates to enforce the substantive provisions of the Fourteenth Amendment; however, there must be unequivocal evidence of such abrogation. See Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). This Court has long held that the mere literal inclusion of the States among those to whom a statute applies does not

suffice to eliminate the States' Eleventh Amendment immunity. Scanlon, supra, 473 U.S. at 245-46; Employees, supra, 422 u.S. at 283-85.

In Quern v. Jordan, 440 U.S. 332 (1979) the Court reaffirmed the holding in Edelman v. Jordan, that the Civil Rights Act of 1871, 42 U.S.C. §1983, does not abrogate the States' Eleventh Amendment immunity despite the Act's clear intent to vindicate individual rights protected by the Fourteenth Amendment. There the Court stated:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive providence of the individual states.

[N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.

. . .

Given the importance of the States' traditional sovereign immunity, if in fact the Members of the 42nd Congress believed that §1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act, along with the other evils that they thought would result from the Act. Instead, §1 passed only with limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting §1. We can only

> conclude that silence on the matter is itself a significant indication of the legislative intent of §1.

Quern, 440 U.S. at 342-343.

Certainly the rights Congress sought to protect by the passage of the Civil Rights Act are as constitutionally compelling as the right to equal education which is being advanced by the EHA, yet Congress did not abrogate the States' immunity in 1871 and it has not done so in the EHA.

The Third Circuit's conclusion that, in enacting the EHA Congress abrogated the States' constitutionally guaranteed immunity, fails to satisfy the stringent criteria defined by this Court in Scanlon. There, the Court refused to find such abrogation of immunity in Congressional passage of the

Rehabilitation Act, 29 U.S.C. §794[7] and announced that it will look no further than the four corners of a statute to discern Congressional intent to abrogate State sovereign immunity. The Court said:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory language. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits

---

[7]The statute at issue in Scanlon is similar to the statute at issue here. Both provide a private right of action for prospective relief for all aggrieved parties and neither explicitly provides a damage remedy or other retroactive relief. Both involve programs through which States receive federal assistance.

> against the States in federal court. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.

473 U.S. at 242 (citations omitted).

Because abrogation of state immunity alters the "constitutionally mandated balance of power between the States and the Federal Government," Ibid. (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 556 (1985) (Powell, J., dissenting)), the Court emphasized that an unusually high standard of certainty of Congress' intent is required to strip the states of their immunity before it will permit lower courts to upset this balance. The Scanlon approach "ensures such certainty." 473 U.S. at 243. This

unusually strict rule of construction is necessary to guard against expansion of federal court jurisdiction by judicial interpretation and to ensure that lower federal courts will not misinterpret the intent of Congress at the expense of the federal system. Id.

Although Congress has the power to override Eleventh Amendment immunity, it does not necessarily follow that it exercised such power in enacting the EHA. In fact, all indicia are to the contrary; there is no reference, either in the language of the statute itself or in the legislative history, that Congress intended this statute to abrogate rights reserved to the States by the Eleventh Amendment. Undeterred by the standard of clarity required by this Court in Scanlon, the Third Circuit found Congress's "unmistakably clear"

intent to abrogate the effect of the Eleventh Amendment in the preamble to the EHA:

> ... it is in the national interest that the Federal government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

20 U.S.C. §1400(b)(9) (emphasis supplied). (Pet. App. 72a).

The Court of Appeals found additional support for its holding in the following statutory language:

> Any party aggrieved by the findings and decision [made in the administrative process] shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

20 U.S.C. §1415(e)(2). (Pet. App. 73a-74a).

Finally, the Third Circuit relied on the Handicapped Children's Protection Act, Pub.L. 99-372, 100 Stat. 796, the 1986 amendment to §1415(e), which provides for counsel fees in certain circumstances and in which Congress notes that certain provisions in the amendment shall not apply if "the Court finds that the State or local educational agency unreasonably protracted the final resolution of the action..." 20 U.S.C. §1415(e)(4)(G). (Pet. App. 76a).

On this meager basis, and despite the fact that the statute makes no mention of the Eleventh Amendment and nowhere states that Congress focused precisely on state liability to private parties, the Third Circuit has discerned the abrogation of a sovereign State's immunity. In so doing, the Court of

Appeals has swept aside, without so much as a passing glance, this Court's repeated admonition that the fundamental values of sovereign immunity will not be abrogated unless Congressional intent to do so is unequivocally and unmistakenly clear.

B. In arriving at its holding, the Third Circuit relied on the decision of a divided panel in David D. v. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140 (1986), which held that the EHA effectively abrogates the sovereign immunity of States. (Pet. App. 74a-75a).

Dissenting from his colleagues in the First Circuit, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 20 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and because, as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court for violation of its statutes, I dissent.

David D., 775 F.2d at 425.

Taking a contrary position to that of the First and Third Circuits, three other Circuits have not found in the language of the statute that unmistakably clear Congressional intent necessary to abrogate the immunity of

the States.[8] This fact alone, that federal appellate courts differ on whether the EHA abrogates Eleventh Amendment immunity, further supports the conclusion that Congressional intent is not unmistakably clear. If such intent is not clear to federal appellate courts, it cannot have been clear to the legislators who voted on the statute or

---

[8]In Miener v. State of Missouri, 673 F.2d 969 (8th Cir. 1982), cert. denied, 459 U.S. 909 (1983), the Eighth Circuit rejected the contention that the EHA abrogates States' immunity; relying on the standard announced in Scanlon, two other Circuits specifically have held that Congress did not abrogate the States' Eleventh Amendment immunity when it enacted the EHA. Gary A. v. New Trier High School District No. 203, 796 F.2d 940 (7th Cir. 1986); Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986), affirmed on other grounds sub. nom. Honig v. Doe, No. 86-728 (Jan., 1988).

to the States who chose to voluntarily participate in the EHA on the basis of the conditions explicit in the language of the statute.

In an attempt to sidestep the persuasive reasoning of its sister appellate courts, and perhaps recognizing that its contrary conclusion belies the existence of the clear abrogation language Scanlon demands, the Third Circuit pointed to the 1986 amendment to the EHA to bolster its decision, concluding that the decisions of the Seventh, Eighth and Ninth Circuits pre-date that amendment and, consequently, their reasoning and conclusion are no longer tenable. (Pet. App. 76a). The subject matter of that amendment, however, is attorney's fees; the amendment says nothing about state liability to private parties and

does not in any way expand the category of litigants who may sue the States for damages. In fact, the language in the amendment relied upon by the Court of Appeals states:

> The provisions of subparagraph (F) [relating to circumstances in which the court shall reduce attorneys' fees] shall not apply in any action or proceeding if the Court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

20 U.S.C. § 1415(e)(4)(G).

If the mere literal inclusion of the States among those to whom a statute applies does not suffice to lift the bar of immunity, Scanlon, 473 U.S. at 245-46, certainly a reference to the States' exposure to attorneys' fees is similarly inconclusive. The Eleventh

Amendment does not, of course, bar an action against state officials for prospective injunctive relief if the Court finds an ongoing constitutional violation, Ex parte Young, 209 U.S. 123, 160 (1908),[9] therefore, in such a case attorneys' fees may be awarded against a

---

[9]In Ex parte Young the Court held that a state official acting in conflict with the Constitution is "stripped of his official representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 160. This holding incorporates the fiction that a suit to enjoin a state official from enforcing an allegedly unconstitutional State law is not a suit against the State for Eleventh Amendment purposes, even though the consequences of the injunction are felt by the State. The Court has carefully limited the reasoning in Young, recently holding that notice relief and declaratory relief are available only to remedy ongoing violations of federal law. Green v. Mansour, 474 U.S. 64 (1985).

state official. Such an award is consistent with the Eleventh Amendment immunity which the States retain under the EHA and its 1986 amendment.

Just as in the EHA, nothing in the language of its 1986 amendment suggests that Congress even considered, let alone eliminated, the Eleventh Amendment immunity of the States. Moreover, attorney's fees are claims for equitable relief, and immunity from damages does not ordinarily bar equitable relief. See Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975). While this Court specifically has held that the Civil Rights Act does not abrogate the States' Eleventh Amendment immunity, it also has held that 42 U.S.C. §1988 authorizes attorney's fees against state

officials as part of the costs in §1983 actions. Hutto v. Finney, 437 U.S. 678, 693 (1978). In fact, when this Court held in Scanlon that §504 of the Rehabilitation Act did not abrogate the States' Eleventh Amendment immunity, it certainly was aware that § 505, 29 U.S.C. §794a(b), authorized attorneys' fees in the same manner -- even incorporating the same legislative history -- as § 1988. The fact that attorneys' fees may be awarded against the States, without more, lends no support to the position that Congress has abrogated the States' constitutional immunity.

Finally, Congress knows full well how to make clear its intent to remove Eleventh Amendment protection. At the same time that Congress was enacting the

EHA amendment it was also enacting the Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, §100 Stat. 1807 (1986), which provide in part that:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. §6101, et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. §2000d, et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Pub. L. 99-506, §1003(a)(1), 100 Stat. 1845, codified at 42 U.S.C. §2000d-7.

In fact, the language used in the Rehabilitation Act Amendments is particularly significant since it was employed specifically to overrule the decision in Scanlon.[10]

We can assume that when enacting the EHA amendment in 1986 to provide for attorneys' fees, Congress certainly was aware of the decision of the Court in Scanlon and of the decisions of the Seventh, Eighth and Ninth Circuits which

---

[10]In their brief opposing the petition for writ of certiorari, Amici suggest that the EHA may be an anti-discrimination statute and might therefore come within the ambit of §2000d-7. (Brief of Amici in Opposition to Petition for Writ of Certiorari, pgs. 12-13). A short answer to this suggestion is that this is the sort of speculation about Congressional intent which this Court has undercut by holding in Scanlon that the abrogation of a State's constitutional immunity from suit in federal court must be unmistakably clear in the language of the statute.

did not find abrogation of States' immunity; at that point, Congress easily could have expressed its intent to abrogate the States' immunity to suit, just as it has done in the Rehabilitation Act Amendments. The fact that Congress did not expressly and unmistakably express that intent compels the conclusion that there was no such intent.

Neither the language of the EHA nor its 1986 amendment provide evidence that Congress intended to sweep away the States' immunity when it legislated in this area. Without such a clear expression of intent, the Third Circuit's opinion must be reversed.

C. By fashioning a damage remedy against the State of Pennsylvania, the District Court and the Court of Appeals have done violence not merely to the delicate constitutional balance which

this Court repeatedly has endeavored to maintain between Eleventh Amendment and Fourteenth Amendment interests, but they also have frustrated the basic and central goals of the EHA.

In enacting a law which sought to ensure equal access to education for handicapped children throughout our nation, Congress realized that its goal could be achieved only if the States entered into a voluntary partnership with the federal government -- a partnership based on a mutual desire to include the weakest and most neglected of its children into the sphere of equal access to educational opportunity. 20 U.S.C. §1400(b)(9). Notwithstanding the federal government's substantial financial contribution to the States pursuant to the provisions of the EHA, the fact remains that the lion's share of the expenses for educating

handicapped children remains the responsibility of the individual States.[11] Pennsylvania's substantial financial investment in the education of its handicapped students is a logical consequence of the fact that education

---

[11]During the 1986-87 school year the Commonwealth of Pennsylvania spent approximately 506 million dollars to educate its exceptional children, (under Pennsylvania law, the term "exceptional children" is defined as children "who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services..." 24 P.S. §13-1371 thus, both handicapped and gifted children fall into this category) for an average expenditure of $1870.00 per child. During the same period Pennsylvania was allocated $282.00 per handicapped child under the provisions of the EHA for a total federal contribution of approximately 59 million dollars. Pennsylvania Department of Education, Bureau of Basic Education Fiscal Administration.

has been and continues to be, a matter of local concern -- traditionally and better addressed at the State and School District levels.

By imposing, what is, in effect, a punitive damage award of one year's private school tuition against the State and the School District for a procedural due process violation,[12] the Court of Appeals has misconceived the intent of Congress and the teachings of this Court. It has misconceived the intent of Congress by adding onto the statute a remedy neither envisioned by the legislators nor necessary to achieve the central goal of the EHA. This is so for several reasons.

---

[12]Whether the delay caused by the Secretary's remand is indeed a procedural due process violation of constitutional dimensions is not before the Court.

First, the States who voluntarily participate in the EHA presumably wish to comply with its terms; therefore, a money damage award is a sledgehammer approach when a notice of violation would suffice to secure compliance. Second, the statute provides the most effective enforcement mechanism of all: the United States Secretary of Education is authorized to withhold federal funds if a State's program is not in compliance with the statute. 20 U.S.C. § 1416. Third, permitting individual suits against the States for monetary relief -- especially of the punitive nature awarded here -- depletes the very same source of funds which the States could be spending on the education of handicapped children. Fourth, prospective injunctive relief is an available judicial remedy against State

officials, and anyone else, engaging in unconstitutional conduct. Ex parte Young, 209 U.S. 123 (1908). Fifth, since a school district will be party to a suit in the overwhelming number of cases brought by parents of handicapped children, the federal policy of enforcement is satisfied by the availability of tuition reimbursement at the local level. Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985).

These various remedies guarantee that State government is both responsive and accountable to the people it serves. While recourse to the federal courts would give parents an additional enforcement tool, Congress, by enacting the EHA without unequivocally abrogating the States' Constitutional immunity, apparently believed that this specific

remedy was not necessary to assure necessary compliance by the States.

The complexity of the States' task in the field of education of the handicapped and the effective enforcement remedies available in the EHA argue against the Court of Appeals' conclusion that States should be liable for monetary awards arising out of individual failure to comply with all the rules and regulations of the program.[13]

---

[13]Moreover, even if damages can be awarded under the EHA against a party not shielded by Eleventh Amendment immunity, the Court of Appeals has misconstrued the teachings of this Court in Carey v. Piphus, 435 U.S. 247 (1978). There, a student claimed that he was denied procedural due process because he was suspended from school without an opportunity to respond to the charges against him.

(Footnote continued on next page).

The central goal of the Act is to provide handicapped children with equal access to educational opportunities,

---

[13](Footnote continued from previous page).

The Court held that compensatory damages would be appropriate only if the student could prove actual injury caused by the denial of the constitutional right to due process. The Court emphasized that "[rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests..." Ibid at 254. For a deprivation of due process rights the Court approved nominal damages of one dollar. Ibid at 266. Here, the Court of Appeals obviously attempted to vindicate Muth's due process rights when the procedural violations had not, in fact, caused any actual injury to him and his son. Such "vindication" is impermissible in light of the holding in Carey.

that goal is not advanced by awarding money damages against the States who fund the greatest portion of that education and who willingly participate in the EHA. Congress recognized that the remedies inherent in the statute are adequate to ensure compliance and for that reason saw no need to abrogate the States' Eleventh Amendment immunity. This Court is urged to correct the holding of the Court of Appeals and reverse.

II. THE EHA DOES NOT PRECLUDE REVIEW OF DUE PROCESS HEARINGS BY A CHIEF EXECUTIVE OFFICER OF THE STATE AGENCY WHEN THE STATE AGENCY IS NOT INVOLVED IN THE DEVELOPMENT OF THE INDIVIDUALIZED EDUCATION PROGRAM

A. This Court on four occasions has described and analyzed elements of the comprehensive procedural system established by the EHA.[14]

---

[14] Honig v. Doe, No. 86-728 (Jan. 20, 1988) (addressing "stay-put" provision); Burlington School Committee (addressing availability of tuition reimbursement remedy for parents who had placed their child in private school during pendency of review procedures); Smith v. Robinson, 468 U.S. 992 (1984) (addressing availability of attorneys fees and relationship to §504 of the Rehabilitation Act of 1973); Hendrick Hudson Central School District Board of Education v. Rowley, 458 U.S. 176 (1982) (addressing standard of federal judicial review).

In each case, this Court noted that Congress "was largely guided" by two landmark trial court decisions: Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 334 F.Supp. 1257 (E.D. Pa. 1971) and 343 F.Supp. 279 (E.D. Pa. 1972) (PARC), and Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 (D.D.C. 1972).[15] This case presents the question of whether Congress, in patterning the EHA on PARC, actually intended to prohibit an important element of the procedural system PARC established.

---

[15] See Burlington School Committee, 471 U.S. at 373; Robinson, 468 U.S. at 1010 (referring only to Congress' recognition of "'landmark court cases'"); Rowley, 458 U.S. at 192.

The procedural system of the statute, like that established by PARC, requires first that local schools develop "individualized educational programs" (IEP's) for handicapped children in cooperation with parents or guardians.[16]

---

[16]The IEP is "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs". Burlington School Committee, 471 U.S. at 368. Parents have a right to "examine all relevant records", Honig, No. 86-728 (Jan. 20, 1988), to participate in the IEP planning conference, and to an opportunity "to present complaints concerning any aspect of the local agency's provision of a free appropriate public education". Ibid.

If parents are dissatisfied with the resolution of any complaint, they have the right to an impartial review process as follows:

> "Whenever [such] a complaint has been received..., the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit <u>involved in the education or care of the child</u>".

20 U.S.C. §1415(b)(2) (emphasis supplied).

> "If [this] hearing ... is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency <u>which</u>

> shall conduct an impartial review of such a hearing. The officer conducting such review shall make an independent decision upon completion of such review."

20 U.S.C. §1415(c) (emphasis supplied).

This case focuses on the requirements of the "impartial" state review of the initial hearing. Specifically, the parties agree that, like the initial hearing, the review cannot be conducted by an employee of an agency which is "involved in the education of the child".[17]

---

[17]The report of the Senate Committee which first developed the impartiality requirement suggests that Congress may have intended the language "involved with the education of the child" to modify the term "employee", not the terms "agency or unit."

(Footnote continued on next page).

---

[17](Footnote continued from previous page).

The Senate Report stated that a hearing "may not be conducted by any State or local educational agency employee who is directly involved in the education of the child." Senate Conf. Rep. No. 94-455, 94th Cong. 1st Sess. 47, reprinted in 1975 U.S. Code Cong. & Ad. News 1470. Subsequently, the Conference Committee deleted the term "directly", but did not specifically indicate any intent to focus on the agency, as opposed to the employee.

Despite this evidence, however, regulations of the United States Department of Education prohibit conduct of a hearing "[by a person who is an employee of a public agency which is involved in the education or care of the child." 34 C.F.R. §300.507. Petitioner here accepts this regulation in light of the ambiguity in the statute. The question, therefore, is whether the Department of Education is "involved" in the education of the child.

The parties disagree, however, whether a State Department of Education is necessarily involved in the education of the child merely because of its general oversight role over special education. The state agency is only "involved in the education of the child" in those circumstances in which the agency is directly providing services to the child or has otherwise participated in the development if the IEP. Moreover, the Secretary of Education, petitioner here, is not an employee of the state agency but a constitutionally appointed member of the State's executive branch, 71 P.S. §67.1(d)(1), whose function is to establish and implement statewide educational policy. Consequently, he is far removed from the individual disputes that arise between parents and the local school districts which are directly

involved in the education of the child.[18]

B. Because Congress generally adopted the "due process hearing" system which originated in the PARC decree, PARC provides the starting point for analysis of the EHA. See Rowley, 458 U.S. 176 (1986), (relying on PARC's standard of judicial review to determine standard for EHA).

In PARC, the goal was to assure public accountability by placing ultimate responsibility for the education of each individual child on the one person who can combine both policymaking and implementing functions -- the State Secretary of Education.

---

[18]Muth has not argued that the Secretary of Education is a biased reviewer for any reason other than that he is an employee of the Department.

The decree provided "that the Secretary of Education shall be responsible for assuring that every mentally retarded child is placed in a program of education and training appropriate to his learning capacities...." 343 F.Supp. at 313. (Consent Decree §40(a)). The reasons: only the Secretary was deemed sufficiently in the public eye that educational decisions would be publicly accountable and only the Secretary was deemed to wield sufficient power to ensure that the best educational decisions were made and executed.

The "due process hearings" served in part as a mechanism for the Secretary to carry out this responsibility. The amended stipulation in PARC provided:

> "The hearing officer shall be the Secretary of Education, or a person designated by him acting in his stead, but shall not be an officer, employee or agent of any local district of intermediate unit in which the child resides". (Amended Stipulation ¶3(L)).

343 F.Supp. at 305.

Unlike local school districts, therefore, the State Department of Education and especially the Secretary, were given the authority and the responsibility, subject to judicial review, to serve as the guardian of the handicapped.

Placing responsibility on the Secretary had the added benefit of institutionalizing a system to educate the Secretary about how to fulfill his overall responsibilities. From below, hearings assured the Secretary a constant flow of information about the

educational adequacy of programs for individual students. From above, meaningful judicial review would assure that the Secretary would learn from his mistakes and conform future decisions to judicial interpretations of the law. The hearings would provide the Secretary of Education the information necessary to fulfill his obligation "directly [to] provide ... and operate programs" for handicapped children if handicapped children were not properly served by local school districts or "otherwise provided for." (Amended Consent Decree ¶51). 343 F.Supp. at 315

C. A close examination of the language of the statute suggests that Congress adopted the principle of impartiality in PARC. Although a court should attempt to give effect to all of

a statute's terms, Reitel v. Sonotone Corp., 442 U.S. 330, 339 (1979), the decision of the Court of Appeals would make superfluous Congress' focus only on agencies "involved in the education of the child."

Section 615(b)(2) of the statute, 20 U.S.C. §1415(b)(2), provides that a hearing "shall be conducted by the State educational agency or by the local educational agency or intermediate unit, as determined by State law." (Emphasis supplied). In other words, the hearing is to be conducted either by the state agency or by the school district or intermediate unit serving the child. Under the analysis of the Court of Appeals, all agencies that might conduct hearings would be "involved in the education of the child" because, by the terms of the EHA itself, they all must exercise at least general

oversight of handicapped children. If Congress had intended such a result, it should therefore have prohibited conduct of a hearing in all cases "by an employee of <u>such</u> agency or unit."

Instead, however, §615(b)(2) only prohibits conduct of the hearing "by an employee of such agency or unit <u>involved in the education or care of the child</u>". <u>Ibid</u>. (<u>Emphasis supplied</u>). Congress therefore did not believe that all agencies conducting hearings were necessarily involved in the education of the child and wished to distinguish between involved and uninvolved agencies. By failing to make such a distinction, the decision below eradicates the significance of the modifying phrase "involved in the education of the child."

Rather than intending this phrase to be superfluous, Congress could only have intended the distinction made in PARC. "involved in the education of the child" means what it says; it refers not to agencies exercising oversight of all handicapped children, but only to those agencies or units actually providing "the child" with services and actually helping to develop the IEP.

In some cases, therefore, this standard does reach state agencies. Congress was aware that state agencies directly provide educational services in some cases and therefore are directly participating in the development of IEP's. For example, the Pennsylvania Department of Education directly manages three special state schools. Similarly,

in Mills, the other landmark case on which Congress relied, the Board of Education of the District directly ran the schools. The decree in that case accordingly provided that hearing officers would not "be an official, employee or agent of the Public School System." Even under the EHA itself, the state agency must in some circumstances provide educational services directly to a child. 20 U.S.C. §1414(d). Rather than attempt to write a blanket rule for all cases, Congress adopted a standard that reflected the numerous educational arrangements throughout the United States while focusing at all times on actual involvement with "the child."

This interpretation of the statute is not only consistent with the language of the statute, it is also consistent

with standards of impartiality. In general, prior exposure or knowledge of the nature of issues involved in a dispute, even engagement in policy-making, does not provide a disqualifying bias but rather is considered a benefit of the administrative process. See, e.g., Hortonville Joint School Dist. No. 1 v. Hortonville Educational Ass'n, 426 U.S. 482, 493 (1976) (decisionmaker is not "disqualified simply because he has taken a position, even in public, on a policy issue related to the dispute"); United States v. Morgan, 313 U.S. 409 (1941) ("underlying philosophy" by cabinet secretary did not render him incapable "of judging a particular controversy fairly on the basis of its own circumstances"). See generally

3 K. Davis, Administrative Law Treatise §19:2, at 372 (2d ed, 1980) ("The law is entirely clear that an announced previous position about law or policy is not a disqualification for exercise of judicial power."). Bias concerns arise only from prior involvement in the decision under review or prejudgment of the facts of a particular case. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (an adjudicator should not "have participated in making the determination under review"); Davis, supra, §19:4, at 382 ("[o]ne who prejudges adjudicative facts ... may be disqualified"); 1 Koch, Administrative Law and Practice §6.7, at 439 (1980).

This conventional view animated PARC and it is therefore likely to have influenced Congress here: due process hearings exist to provide parents with a forum to challenge the decision of

school officials. Obviously, neither hearings nor reviews should be conducted by anyone closely associated with the very school officials whose educational plan a parent rejects. In general, however, the state agency and its Secretary are not associated in this way. They are the watchdogs, not the associates, of the school officials who have prepared the IEP rejected by the parents.[19]

In contrast to this interpretation of impartiality, which is consistent with the responsibility placed by the statute on state agencies, the Court of Appeals offered no explanation of how its interpretation could further the purpose of the Act. The decision below

---

[19]Petitioner here supervises 501 school districts and 29 intermediate units. 24 P.S. §9-952.

refers vaguely to furthering "the ultimate objectives of the process." It also states that Congress desired "decisionmakers who are not subject to the kind of pressures that employees of an educational agency would necessarily feel." [Pet. App. 48a]. But neither the Court below, nor any lower court that has rendered a similar ruling, could provide other than a conclusory explanation of partiality.[20]

---

[20]Systems guaranteeing independence of administrative law judges exist to insulate them from the initial decision in that same case by other members of the agency. When no member of an agency has made a decision under review, the need for guarantees of independence evaporates. Administrative law judges do not exist generally to provide a check on the agency itself; they are a part of the agency and indeed are normally "employees" of the agency. Frequently, decisions of the administrative law judges are themselves reviewable by the heads of an agency. The check on the agency itself comes from judicial review.

In essence, the decision below took an administrative model from other systems and imposed it out of context. The decision gratuitously imposes a purely judicial model on what "framers of the law viewed ... as a means of providing a relatively informal, inexpensive and prompt remedy when agreement could not be reached in the educational planning process." U.S. Dept. of Education, Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act, 75 (1987). As a 1982 study revealed, issues presented at due process hearings are quintessentially decisions of educational policy; they are chiefly decisions involving the appropriateness of a child's school placement, the appropriateness of a student's program

and services, or the appropriateness of the evaluation. U.S. Dept. of Education, Fourth Annual Report to Congress on the Implementation of Public Law 94-142: The Education for All Handicapped Children Act 45 (1982).

Congress did not seek uniformed decisionmakers, but decisionmakers informed by the experience of working in and struggling with the problems of special education. Given the educational nature of the decisions, it is critical that the agency and the official directly responsible for ensuring statewide compliance with the EHA not be excluded from the decisionmaking process.

D. When a Senate Subcommittee began developing the due process requirements of the EHA, the PARC plaintiffs advised the subcommittee to adopt this principle of accountability: "The ultimate responsibility and authority to assure a free public education appropriate to the educational needs of each school aged mentally retarded child should lie with the Secretary of Education." Hearings before the Subcommittee on the Handicapped of the Committee on Labor and Public Welfare, 93rd Cong., 1st Sess., Part 3, 1513 (1974) (prepared comments of Pennsylvania Association for Retarded Children) (emphasis supplied). The Senate Committee accepted this advice, and its Report stated that the

"Committee bill has been designed [inter alia] ... to assure sole responsibility for the education of all handicapped children by the State educational agency." S.Conf.Rep. No. 94-168, 94th Cong., 2nd Sess. 29, 47, reprinted in U.S. Code Cong. & Ad. News at 1437-38.

On its face, therefore, the EHA makes the "State educational agency ... responsible for assuring that the requirements of" the statute are carried out. 20 U.S.C. §1412(6). The state educational agency must set forth a plan for the education of the handicapped, and this plan must provide guarantees of appropriate education. 20 U.S.C. §1413. The state educational agency is responsible for "the development and implementation of a

comprehensive system of personnel development" including training and the dissemination to teachers of "significant information derived from educational research, demonstration and similar projects". 20 U.S.C. §1413(a)(3)(A). The state educational agency must adopt "where appropriate, promising educational practices and materials". 20 U.S.C. §1413(a)(3)(B).

Furthermore, the state educational agency must judge the adequacy of a local educational agency's programs. 20 U.S.C. §1414(b). If those programs are inadequate, the state agency should cut off funds. 20 U.S.C. §1414(b)(2)(A)(i). As in PARC, the state agency should even

"provide special education and related services directly to handicapped children" if those children are not otherwise served. 20 U.S.C. §1414(d).

Like the parties in PARC, Congress also expected due process hearings to complement the other state agency functions. For example, in the 1975 amendments, Congress required that hearings either be conducted initially by the state agency or be reviewed by the state agency. Pub.L. 94-142, §615(b), codified at 20 U.S.C. §1415(b). If Congress did not intend hearing officers to have a special affinity with the state agency, Congress had no reason to require State involvement in administrative review.

In addition, the statute requires that due process hearing decisions serve both as a means of informing the State agency of local program inadequacies and of helping to stimulate State responses. In determining the adequacy of a local educational agency's programs, the state agency must "consider any decision made pursuant to a [due process] hearing... which is adverse to the local educational agency or intermediate educational unit involved in such decision." 20 U.S.C. §1414(b)(3). By making due process hearing decisions subject to judicial review, Congress assured a judicial check on State activities.

In Rowley the Court recognized the relationship between the EHA's hearing process and the statute's mandate that the State be the responsible educational agency. This Court held that the State's responsibility of "acquiring and disseminating" knowledge of good practices, and of "adopting" those practices where appropriate, constituted a "clear statutory directive" that Congress did not intend "courts to overturn a State's choice of appropriate educational theories in a [due process] proceeding." 458 U.S. at 207-08. This Court recognized, therefore, that due process hearings are themselves means by which state agencies learn of, adopt and disseminate promising practices. Congress could not logically

have intended state agencies to be responsible for developing promising educational policies and yet have intended the head of a state agency to defer to the educational theories of hearing officers outside the employment of the agency.

The EHA therefore parallels the PARC decree in important ways that cast doubt on any claim that Congress intended the impartiality requirement announced by the Third Circuit. Like PARC, the EHA relies on the state educational agency to assure appropriate education for each child. Like PARC, the EHA uses the due process hearing mechanism to help accomplish that goal. Forbidding the State Secretary of Education from involvement would undercut these goals.

It would remove from the Secretary the ultimate responsibility for the education of each child; it would therefore reduce the Secretary's accountability to the public and to the courts. The decision below is therefore inconsistent with the structure of the EHA and with its origins in the PARC decree.

E. The Court of Appeals and every other decision supporting its position have erroneously relied on language in the Conference Report synthesizing Senate and House versions of the EHA.[21] The Report states in pertinent part:

---

[21]Two lower court cases support the holding that the chief executive of a state education agency may review due

(Footnote continued on next page).

---

[21](Footnote continued from previous page).

process appeals. Victoria L. v. District School Board of Lee County, 741 F.2d 369, 374 (11th Cir.1984); Brandon E. v. Wisconsin Department of Public Instruction, 595 F. Supp. 740, 746 (E.D. Wisc. 1984). Several cases support the decision below. In each of these cases, the court based its decision primarily on the language of the Conference Report. See Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982), Helms v. McDonald, 647 F.2d 800, 806 n. 9 (5th Cir. 1981), cert. denied, 455 U.S. 946 (1982); Robert M. v. Benton, 634 F.2d 1139, 1142 (8th Cir.1980); Vogel v. School Board of Montrose, 491 F. Supp. 989, 995 (W.D. Mo. 1980). In Mayson by Mayson v. Teague, 749 F.2d 652 (11th Cir. 1984), the Court of Appeals did not independently analyze the Conference Report but simply adopted the holding of other courts that had.

Two Circuit Courts of Appeals have noted the conflicting cases but have not ruled upon the question. See Cain v. Yukon Public School District, 775 F.2d 15, 20 (10th Cir. 1985); Colin K. v. Schmidt, 715 F.2d 1, 5 n. 3 (1st Cir. 1983).

"(b) ...[T]he conferees point out that any [due process] hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party to any complaint presented.

(c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings and individuals conducting a review of the local due process hearing; ..."

S. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in 1975 U.S. Code, Cong. & Admin. News 1480, 1502.

At first glance, this language does appear to support the decision below. Paragraph (b) states that "any" hearing shall be conducted not by the agency but at the appropriate agency level. But paragraph (b) proceeds to explain the reason for this concern: the Conference Committee did not wish the hearing conducted by the agency when the agency is itself a party to the complaint. The report further suggests an awareness that a State will not always be party to a complaint, for it states that a "State or local agency or intermediate unit will be a party to any complaint." (Emphasis supplied). In fact, state agencies are typically not parties to a complaint. A court should not extend the concern of the Conference Committee out of context; the prohibition on hearings by employees

should not apply even when a state agency is not a party to a complaint.

Paragraph (c) provides even less support to the decision below. Although it equates standards of impartiality for the local and state decision, the standard it enunciates only reiterates the statute. The Report does not prohibit conduct of a hearing by an employee of any "state or local educational agency," but only of such agencies "involved in the education of the child." Like the statute, the Report therefore distinguishes between situations in which state agencies are "involved" and situations in which they are not.

The Conference Report at best is ambiguous. No other language in the legislative history supports such a view. Indeed, of the original House and Senate bills, only the Senate bill

prohibits hearings by employees "involved in the education of the child." S. Rep. No.94-168, 94th Cong., 2d Sess. 29, 47, reprinted in (1975) U.S. Code. Cong. & Admin. News 1425, 1453, 1470. Nothing in the Senate Report, however, suggests an intent to go beyond the PARC restriction. Nor did any witness testify in favor of a tighter restriction. The Conference Report itself expressed no reason for such a significant change from PARC.

In arriving at its holding the Court of Appeals failed to consider that:

> "[I]n expounding a statute we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy."

Pennhurst State School and Hopsital v. Halderman, 451 U.S. at 18.

In the absence of clearer statutory language or legislative intent, in light of the structure of the statute, the language of the statute, and the alternative interpretation's failure to accomplish any reasonable purpose, this Court should hold that the Court of Appeals erred in grafting onto the EHA a standard of impartiality not envisioned or required by Congress.

CONCLUSION

For the foregoing reasons, petitioner asks the Court to reverse the judgment of the Court of Appeals.

LeRoy S. Zimmerman
Attorney General

Maria Parisi Vickers
Chief Deputy Attorney General
Chief, Eastern Region
Counsel of Record

John G. Knorr, III
Chief Deputy Attorney General
Chief, Litigation Section

Gregory R. Neuhauser
Senior Deputy Attorney General

Attorneys for Petitioner

OFFICE OF ATTORNEY GENERAL
206 State Office Bldg.
Philadelphia, PA 19130
Telephone (215) 560-2402

Dated: December 1, 1988

Supreme Court, U.S.
FILED
DEC 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5)

NO. 87-1855

IN THE SUPREME COURT OF
THE UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

V.

RUSSELL A. MUTH, JR., et al,
Respondent
and
CENTRAL BUCKS SCHOOL DISTRICT,
Respondent

On Writ of Certiorari To The
United States Court of Appeals
For The Third Circuit

BRIEF FOR RESPONDENT CENTRAL BUCKS SCHOOL DISTRICT

Joanne D. Sommer, Esquire
Eastburn and Gray
60 East Court Street
Doylestown, PA 18901
(215) 345-7000

Hopp

QUESTIONS PRESENTED

1. Whether Congress abrogated the Eleventh Amendment Immunity of the States in enacting the Education for All Handicapped Children Act.

2. Whether, even if the Pennsylvania Secretary of Education's review of the decision of due process hearing officer violated respondent's procedural due process rights, the award of damages other than nominal damages was appropriate?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED.....i

TABLE OF AUTHORITIES.....iii

STATUTORY PROVISIONS INVOLVED.....vi

SUMMARY OF ARGUMENT.....1

ARGUMENT

I. CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES IN ENACTING THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT.....4

II. EVEN IF THE PENNSYLVANIA SECRETARY OF EDUCATION'S REVIEW OF THE DECISION OF THE DUE PROCESS HEARING OFFICER VIOLATED RESPONDENT-MUTH'S PROCEDURAL DUE PROCESS RIGHTS, THE AWARD OF DAMAGES OTHER THAN NOMINAL DAMAGES WAS INAPPROPRIATE.....22

CONCLUSION.....38

TABLE OF AUTHORITIES

CASES — PAGE

Antkowiak by Antkowiak vs. Ambach, 653 F.Supp. 1405, 1419 (W.D.N.Y. 1987).....18

Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985).....1,4, 5,6,7, 9,11, 18

Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985).....19,36 37

Cain vs. Yukon Public Schools, 775 F.2d 15 (10th Cir. 1985).....36

Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978).....2,28, 29,30, 35

Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983).....10,17

David D. vs. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140, (1986).....17,18

PAGE

Edelman vs. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974); reh'g. denied, 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed. 2d 177 (1974).....5,6

E.E.O.C. vs. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed. 2d 18 (1983).....10

Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).....5

Fitzpatrick vs. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976).....9

Garcia V. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985).....4

Hall vs. Vance, 774 F.2d 629 (4th Cir. 1985).....35

Hans vs. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 892 (1890).....5

McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985).....35

PAGE

Muth vs. Smith, 839 F.2d 113, (3d Cir. 1988); 646 F.Supp. 280 (E.D. Pa. 1986).....24,27 32,34

Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982).....10,12 16,17

Pennhurst State School and Hospital vs. Haldeman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 67 (1984).....5

Quern vs. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed. 2d 358 (1979).....5

Rose vs. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817 (1985).....3,37

U.S. vs. Union Gas Company, 832 F.2d 1343 (3d Cir. 1987).....7

United States vs. Union Gas, 792 F.2d 372 (3d Cir. 1986).....7

Welch vs. Texas Department of Highways and Public Transportation, 403 U.S. _____, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987).....7

Wood vs. Strickland, 420 U.S. 308 (1975)...29

CONSTITUTIONAL PROVISIONS PAGE

U.S. Const. Amend. XI.....4

U.S. Const. Amend. XIV,
Sec. 1.....8

Sec. 5.....1,8,
10,11
21

FEDERAL STATUTES AND REGULATIONS PAGE

Education for All Handicapped Children
Act of 1975, P.L. No. 74-172,
20 U.S.C. Sections 1400-1461.....1

20 U.S.C. Section 1400(B)(9).....10

20 U.S.C. Section 1412.....17

20 U.S.C. Section 1412(1).....12

20 U.S.C. Section 1412(3).....13

20 U.S.C. Section 1412(4).....13

20 U.S.C. Section 1412(6).....13

20 U.S.C. Section 1412(7).....14

20 U.S.C. Section 1413.....17

20 U.S.C. Section 1414(a)(5).....13

20 U.S.C. Section 1415.....14,22

20 U.S.C. Section 1415(a).....12

20 U.S.C. Section 1415(e)(3).....24,25
26,33

PAGE

34 C.F.R. Section 300.2.....17

34 C.F.R. Section 300.513(a).....24,26
33

Rehabilitation Act of 1973 (Section 504)
29 U.S.C. Section 794.....11,17

42 U.S.C. Section 1983.....11,29

STATE STATUTES

PAGE

22 Pa. Code Section 13.32(22).....24,26
33

MISCELLANEOUS

PAGE

S.Conf. Rep. No. 94-168,
94th Cong., 2d Sess. 29, 47,
reprinted in 1975
U.S. Code Cong. & Ad. News
1428, 1440, 1441, 1446, 1448, 1433.....9,10,
12,13,
14,16

SUMMARY OF ARGUMENT

I. Congress has exercised its power under Section 5 of the Fourteenth Amendment in enacting the Education for All Handicapped Children Act, 20 U.S.C. Section 1401 et seq. As such, Congress had the power to abrogate the Eleventh Amendment immunity enjoyed by the States. It is clear that the provisions of the EHA focus directly on state conduct and envisions State responsibility for assuring that all handicapped children receive the free appropriate public education to which they are entitled, Id., S.Conf.Rep. No. 94-168, 1975 U.S. Code Cong. & Ad. News, 1448. The wording of the statute itself as well as the legislative history of the EHA expresses the clear, unambiguous intention of Congress to abrogate the Eleventh Amendment immunity of the States, Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) and to impose upon the States liability, including

retroactive money damage awards, for violations of the EHA.

II. Even if the review of Respondent-Muth's appeal from the Hearing Officer's decision by the Pennsylvania Secretary of Education violated the Education for All Handicapped Children Act, the award of damages in the form of tuition reimbursement was inappropriate. Further, an award of damages against Respondent-School District was unjustified under the facts of this case.

A prerequisite to the recovery of other than nominal damages must be a showing of actual rather than presumed injury, Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed 2d 252 (1978). Here, Respondent-Muth has made no showing that the deprivation of his due process rights caused him to suffer monetary or emotional damages. Moreover, damages against Respondent-District should not have been awarded

since no action or inaction of Respondent-District caused the deprivation of Respondent-Muth's rights, Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied 474 U.S. 817 (1985).

ARGUMENT

I. CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATE IN ENACTING THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT.

A. Scope of the Eleventh Amendment's Grant of Sovereign Immunity.

The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

By guaranteeing the sovereign immunity of the States, the Eleventh Amendment serves to maintain the constitutionally mandated balance of power between the States and the Federal government, Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985); Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 547, 105 S.Ct. 1005, 83 L.Ed. 2d 1016 (1985). Over

the years, the Supreme Court has had many occasions to interpret the scope of the Eleventh Amendment's grant of sovereign immunity to the States.[1] Two principles emerge from the Court's

---

[1]In Hans vs. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 892 (1890), this Court held that a state could not be sued in Federal Court by a citizen of another state or a foreign state, or by its own citizen. Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed 714 (1908), allowed the Federal Court to issue an injunction requiring state officials to conform their future conduct to the requirements of federal law even though the issuance of an injunction would have an ancillary effect on the state treasury. Edelman vs. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974), reh'g. denied 416 U.S. 1000, 94 S.Ct. 2414, 40 L.Ed. 2d 777 (1974), allowed the issuance of an injunction governing the future conduct of a state official but held that the Eleventh Amendment barred an award of retroactive relief in the form of money damages against the state. See also, Pennhurst State School and Hospital vs. Haldeman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed. 2d 671 (1984), Quern vs. Jordan, 440 U.S. 332, 99 S.Ct. 1139. In Pennhurst State School and Hospital vs. Haldeman, supra, this Court held that the Eleventh Amendment barred Federal Court jurisdiction of a state law injunction suit against state officials. In a per curiam opinion, this Court decided that a state did not waive its Eleventh Amendment immunity by participating in a federally funded program. See also, Edelman vs. Jordan, supra. More recently, in Atacasdaro State

analysis of the Eleventh Amendment: (1) a state may waive its constitutional immunity; and (2) Congress may abrogate the Eleventh Amendment immunity enjoyed by the States through its exercise of the legislative power granted under Article I of the United States Constitution, Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985); Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974).

Where a state has consented to suit in Federal Court, the language expressing such a waiver of constitutional immunity must be clear and unequivocal, Edelman, Id. at p. 673. The mere participation in a federally funded program or receipt of federal funds does not establish that a state has consented to suit in federal

Hospital vs. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985), this Court discussed the factors to be reviewed when determining whether Congress, in enacting a particular piece of legislation, intended to abrogate the Eleventh Amendment immunity enjoyed by the States.

court, Atascadero, Id. at p. 246, Welch vs. Texas Department of Highways and Public Transportation, 403 U.S. _____, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987).

B. Congressional Abrogation of Eleventh Amendment Immunity.

In determining whether Congress has abrogated the state's Eleventh Amendment immunity,

> The Court has insisted that the statute, when read literally, not merely allows suits against the State, but that it does so with such specificity that it is clear that Congress consciously and directly focused on the issue of State sovereign immunity and chose to abrogate.

U.S. vs. Union Gas Company, 832 F.2d 1343 (3d Cir. 1987) quoting United States vs. Union Gas, 792 F.2d 372 (3d Cir. 1986). It is therefore necessary to examine Congress' intent in enacting the EHA. Measured against the standards set by this Court in determining the

application of Eleventh Amendment immunity to a particular statute, it is clear that Congress intended to abrogate the Eleventh Amendment immunity of the states when it enacted the Education for All Handicapped Children Act (hereinafter EHA).

In drafting the EHA, Congress was acting pursuant to its powers under Section 5 of the Fourteenth Amendment to the U.S. Constitution. Section 1 of the Fourteenth Amendment provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. Amend. XIV Sec. 1. Section 5 of that Amendment states as follows:

> The Congress shall have power to enforce by appropriate legislation, the provisions of this Article.

When acting pursuant to Section 5 of the Fourteenth Amendment, Congress can abrogate the

Eleventh Amendment without the States' consent, Fitzpatrick vs. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed. 2d 614 (1976); Atascadero State Hospital vs. Scanlon, Id.

The legislative history of the EHA indicates Congress' intent to rely on its Fourteenth Amendment responsibilities and powers to assure all handicapped children and their parents the equal protection of the laws guaranteed by the Fourteenth Amendment. The Senate Committee on Labor and Public Welfare determined that States had primary responsibility to uphold the Constitution of the United States and their own State Constitutions and State laws while recognizing Congress' own responsibility under the Fourteenth Amendment to assure equal protection of the law, S.Rep. No. 94-168, 94th Cong. 1st Sess. 13 Reprinted in 1975 U.S. Code Cong. & Ad. News 1428, 1446. The Senate Committee unequivocally stated:

> It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to

> guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the government to merely establish an unenforceable goal requiring all children to be in school. S.6 takes positive steps to insure that the rights of children and their families are protected. 1975 U.S. Code Cong. & Ad. News 1428, 1433.

From the language of the legislative history, it is easy to discern that Congress intended to support the exercise of its power to abrogate the States' Eleventh Amendment immunity when enacting the EHA, under Section 5 of the Fourteenth Amendment, E.E.O.C. vs. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed. 2d 18 (1983), Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983). Indeed, by the clear equal protection language contained in the EHA's congressional statements and declarations, 20 U.S.C. Section 1400(B)(9), Congress demonstrated its awareness that the EHA was an exercise of its power under Section 5 of the Fourteenth Amendment, Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982).

The foregoing excerpts from the legislative history shows that Congress was acting pursuant to its authority under the Fourteenth Amendment when it enacted the EHA. We now turn to the question of whether Congress did, in fact, abrogate the States' Eleventh Amendment immunity by the statutory language contained in the EHA.

D. Direct Liability of the States under the EHA.

Unlike other federal statutes passed pursuant to Congress' authority under Section 5 of the Fourteenth Amendment[2], the EHA focuses primarily on the duty of States, not simply state officials or agencies. The statute creates a legal duty on the part of the State

---

[2]See 42 U.S.C. Section 1983, The Civil Rights Act of 1964 which applies to "any person" and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (prior to 1986 amendments). See also Atacasdaro State Hospital vs. Scanlon, supra.

and makes the duty judicially enforceable, Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D. 1982). Indeed, the legislative history of the EHA reveals six goals considered of paramount importance to Congress in addressing the rights of handicapped children. Those goals are embodied in the language of the statute. The six express goals as set forth in the legislative history and codified by the terms of the EHA are as follows. First, "the Committee bill requires that the state have in effect a policy that assures all handicapped children the right to free appropriate education." U.S. Code Cong. & Ad. News 1975, 1440. This goal was codified at 20 U.S.C. Section 1412(1). Second, "the bill requires that the state will undertake or has undertaken policies and procedures to assure that a free appropriate public education will be available to all handicapped children..." 1975 U.S. Code Cong. & Ad. News, 1441; see 20 U.S.C. Section 1415(a). Third, the bill requires that the state establish timetables for the provision

of a free appropriate public education to handicapped children, Id.; see 20 U.S.C. Section 1412(3). "Fourth, it requires that the state assure that local educational agencies provide and maintain records of the individualized planning conference for each handicapped child including the statements of all public conferences, and that such conferences will be conducted at least three times a year to develop, review and, with the agreement of the parent or guardian, revise the statement." Id.; see 20 U.S.C. Section 1412(4), 1414(a)(5). "Fifth, the bill requires that the State Educational Agency be responsible for insuring the implementation of and compliance with the provisions of the Act," and that the State be responsible for the general supervision of educational programs for handicapped children whether administered by any other state or a local agency. Id.; See 20 U.S.C. Section 1412(6). "Finally, to insure orderly due process with regard to carrying out the

provisions of the Act and to insure compliance with the provisions of the Act, the committee provides that the State shall establish policies and procedures to provide consultation with persons involved in or concerned with the education of handicapped children including handicapped individuals and parents of handicapped children. Further, in this regard, the State shall establish an entity to assure compliance with the provisions of the Act which shall conduct periodic evaluations and be empowered to receive, and take such necessary steps as are required, to resolve complaints and violations of the requirements of the Act." Id.; see 20 U.S.C. Section 1415, 1412(7).

The unmistakable and unequivocal language of the EHA and its legislative history demonstrates that Congress intended that the States bear full responsibility for implementation and enforcement of the EHA. The Senate Committee Report describing Congress' intention to hold the states strictly liable under the EHA

demonstrates that abrogation of the states' Eleventh Amendment immunity is the only reasonable interpretation of the language of the EHA.

> The Committee Bill requires that the State educational agency be responsible for insuring that all requirements of the Act are carried out, and that all education programs for handicapped children within the State, including all such programs administered by any other State or local agency, must meet State educational agency standards and be under the general supervision of persons responsible for education of handicapped children. This provision is included specifically to insure a single line of responsibility with regard to the education of handicapped children, and to insure that in the implementation of all provisions of the Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency. Under other provisions of the Committee bill, funds paid to a State for other federal programs which provide assistance for the education of handicapped children are required to be utilized by the State in a way which is designed to meet the timetables under this Act and the priorities established for serving handicapped children. The Committee expects that the chief State school officer of the State will take all steps necessary to assure the cooperation of other State educa-

tional agency personnel in carrying out this requirement.

> The Committee considers that establishment of single agency responsibility for assuring the right to education of all handicapped children of paramount importance. Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many states, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of rights of handicapped children is squarely the responsibility of one agency.

1975 U.S. Code Cong. & Ad. News 1428, 1448 (emphasis supplied).

Although the language of the EHA itself does not contain a catch phrase such as "abrogation of Eleventh Amendment immunity of the States" the clear and unmistakable intention of Congress was to impose upon the States liability for "all appropriate relief", Parks vs. Pakovic, 536 F.Supp. 296 (N.D. Ill., E.D.

1982), Crawford vs. Pittman, 708 F.2d 1028 (5th Cir. 1983). Such appropriate relief necessarily includes an award of damages against the State, especially in cases such as the case at bar, where Pennsylvania's policy and procedures violated the requirements of the EHA. "To hold that damages cannot be awarded even when "appropriate" under the Act would be to subvert the clear congressional intent to impose liability on States for "all appropriate relief". Parks v. Pakovic, 536 F.Supp. 296, 309 (N.D. Ill., E.D. 1982).

Moreover, the remedies for violation of the EHA are not directed to "any recipient of federal assistance" as in Section 504 of the Rehabilitation Act, 29 U.S.C. Section 794, but are directed to one class of actors: states and state agencies responsible for providing public education. See, e.g., 20 U.S.C. Section 1412, 1413; 34 C.F.R. Section 300.2, David D. vs. Dartmouth School Committee, 775 F.2d 411 (1st Cir. 1985), cert. denied, 475 U.S. 1140, 106

S.Ct. 1790, 90 L.Ed. 2d 336 (1986); Antkowiak by Antkowiak vs. Ambach, 653 F.Supp. 1405, 1419 (W.D.N.Y. 1987). As the Court of Appeals pointed out in David D., "obviously, since the State is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the State should be named as an opposing party, if not the sole party, to the proceedings." David D. vs. Dartmouth School Committee, Id. at 422. To hold that the Eleventh Amendment bars an award of damages, such as tuition reimbursement, against a state which has violated the terms of the EHA, is, in effect, requiring "the federal courts to protect states that violate federal law from the legal consequences of their conduct", Atascadero State Hospital vs. Scanlon, 473 U.S. 234, 258, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) (Brennan dissent.)

Congress' clear intention in enacting the EHA was to create a harmonious working relationship between the state educational agency, ultimately responsible for the provision of a free appropriate public education, and a local educational agency, involved in the day to day education of the handicapped child. This Court's decisions in EHA cases have interpreted the EHA as allowing for awards of damages against local school districts which violate either the procedural or substantive requirements of the Act, Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985). To now hold, under the facts of this case, that the local school district, which at all times had available an appropriate program of education for the handicapped child, is accountable for a state's failure to implement properly the EHA's procedural due process requirements, would discourage the establishment of a harmonious

relationship between state and local educational agencies. Indeed, imposition of damages against the Central Bucks School District in this case, provides no incentive to the Commonwealth of Pennsylvania to alter in any way the due process procedures in effect which resulted in the deprivation of Respondent-Muth's procedural due process rights. Pennsylvania could continue to require its school districts and intermediate units to follow the due process procedures established by the state despite a declaration by this or any other federal court, that such procedures violate the terms of the EHA. The local school districts would therefore be placed in a "Catch-22" situation. An appeal to the Secretary of Education would be disallowed by federal court decisions and the taking of such an appeal could result in the imposition of damages against the local district. Failure to take such an appeal to the Secretary of Education would be a failure to exhaust the administrative procedure provided by the

Pennsylvania Code. Moreover, the refusal of a local school district to follow the procedures mandated by the Pennsylvania statute could result in the denial of special education funding by the State. Surely, Congress did not envision this result when it enacted the EHA. Congress' unmistakable and unequivocal intention was to allow the federal courts to be the final arbiters of questions arising under the provisions of the EHA and to allow the federal courts to fashion "the appropriate relief", including the imposition of money damages against a state, that was within its power under Section 5 of the Fourteenth Amendment.

II. EVEN IF THE PENNSYLVANIA SECRETARY OF EDUCATION'S REVIEW OF THE DECISION OF THE DUE PROCESS HEARING OFFICER VIOLATED RESPONDENT'S PROCEDURAL DUE PROCESS RIGHTS, AN AWARD OF DAMAGES OTHER THAN NOMINAL DAMAGES WAS NOT APPROPRIATE.

A. Factual and Procedural Background.

Respondent-School District incorporates by reference the arguments of petitioner set forth in its brief and supports the conclusion of petitioner that the Pennsylvania Secretary of Education's review of the decision of the due process hearing officer did not violate the provisions of the EHA. The damage award must therefore be vacated in its entirety.

Assuming arguendo, that this Court finds that the Pennsylvania Secretary of Education was an improper review officer under the procedural due process scheme incorporated into the EHA, 20 U.S.C. Section 1415, the Court of Appeals and District Court below erred in awarding tuition reimbursement to Respondent-

Muth for the procedural due process violation. A brief review of the facts of this case is appropriate at this juncture.

Alexander, a child with a learning disability, began attending school in the Central Bucks School District in 1980. He was placed in a class for learning disabled children and individualized educational program plans (hereinafter "IEP") were developed and implemented with the approval of the parent for several years. In 1983, however, Alexander began expressing a desire to be placed in regular classes rather than in classes for learning disabled students. At the parent's request, the School District agreed to mainstream Alexander for English and Science on a trial basis beginning in March, 1983, but, when it became clear to the School District that Alexander was not succeeding in the mainstreaming program, the School District called an IEP conference on June 17, 1983. At that time, the School District recommended that Alexander

be returned to the more restrictive setting of the learning disabilities classroom for all of his substantive subjects. The School District proposed to prepare a new IEP for Alexander and to implement that IEP during the 1983-84 school year, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988). Only three days after the School District recommended that Alexander's placement and IEP be changed, the parent requested a due process hearing and further requested that no change be made in Alexander's program until such a hearing had been held, Id. at page 117, n.4; Muth v. Smith, Finding of Fact No. 30, Opinion of Huyett, J., Aug. 28, 1986, Pet. p. 112a. As the Court of Appeals noted, "such a request from a parent is a legal bar against any change in the child's placement under 22 Pa. Code Section 13.32(22). Pennsylvania law is required to include this provision by 20 U.S.C. Section 1415(e)(3) and 34 C.F.R. Section 300.513(a). The School District therefore refrained from revising Alexander's IEP to reflect the June,

1983 recommendations," Id. Indeed, it was unrealistic to expect the School District to revise Alexander's IEP within three days of the IEP conference of June 17, 1983.

In accordance with Pennsylvania procedure, the School District immediately requested the appointment of a hearing examiner. Because of delays caused largely, if not entirely, by Respondent-Muth, a due process hearing was not held until September 30, 1983. Id. at page 117, n.6. Prior to that time, and prior to the commencement of the 1983/84 school year, the parent decided to enroll Alexander at the Landmark School, a private school in Massachusetts for learning disabled children, Id. p.117. Thus, the parent had already unilaterally decided to remove his son from the Central Bucks School District knowing full well the recommendations that the School District had made regarding the discontinuance of the

mainstreaming program.[3]

The due process violations complained of in this case began when the October 31, 1983 decision of the Hearing Officer was appealed to the Pennsylvania Secretary of Education. The hearing officer specifically found that the mainstreaming program proposed by the March, 1983 IEP (unrevised at the parent's request and as required by 22 Pa. Code Section 13.32(22), 20 U.S.C. Section 1415(e)(3) and 34 C.F.R. Section 300.513(a)), was inadequate. That fact was undisputed by the School District, which placed

---

[3]Although the program proposed by the School District in June of 1983 was more restrictive than the mainstreaming program implemented in March, 1983, placement of Alexander at the Landmark School in Massachusetts was more restrictive still. Landmark School is a school exclusively for learning disabled children with no opportunity for mainstreaming into classes with regular education students. It is a residential facility with little or no opportunity for interaction between regular education students and the community at large and the learning disabled children. Muth vs. Smith, Finding of Fact No. 51, Opinion of Huyett J., Aug. 28, 1986, Pet. 128a.

into evidence the recommendations made in June, 1983, Muth vs. Smith, 839 F.2d 113, 118 (3d Cir. 1988). On appeal to the Secretary of Education, the Secretary, recognizing that the School District's June, 1983 recommendations could not have been incorporated into an IEP pending resolution of the parent's complaint, ordered the preparation of a new IEP which codified the recommendations made by the School District. The new IEP was presented to the Hearing Officer on June 7, 1984 and was ultimately determined to propose an appropriate program of education for Alexander.

Prior to the second due process hearing of June 7, 1984, this federal lawsuit was filed by Respondent-Muth. At trial, before the Honorable Daniel J. Huyett, III, the School District presented the 1983/84 IEP which embodied the June, 1983 recommendations discontinuing the mainstreaming for Alexander. The IEP was upheld by the District Court as proposing an appropriate program of education for the 1983/84

school year and was approved by the Third Circuit Court of Appeals as well. However, it was determined by the lower courts that Pennsylvania's Secretary of Education should not have reviewed the decision of the Hearing Officer and that therefore, Respondent-Muth's due process rights under the EHA had been violated. As compensation for this procedural due process violation, the court awarded damages against both the School District and the Commonwealth of Pennsylvania. Despite the fact that there was no evidence on the record of any harm caused to Respondent-Muth by the procedural due process violations, the District Court awarded one year's tuition reimbursement.

B. Legal Standards for Recovery of Damages.

In Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 252 (1978), this Court delineated the prerequisites for recovery of

damages for procedural due process violations. That case, although discussing a violation of 42 U.S.C. Section 1983, provides the criteria which must be met before more than nominal damages are awarded for procedural due process violations. As Justice Powell, writing for the Court, stated:

> Our legal system's concept of damages reflects this view of legal rights. 'The cardinal principal of damages in anglo-american law is that of compensation for the injury caused to plaintiff by defendants breach of duty.' 2 F. Harper and F. James Law of Torts Section 25.1, page 1299 (1956). The Court implicitly has recognized the applicability of this principle to actions under Section 1983 by stating that damages are available under that Section for actions 'found to have been violative of ... CONSTITUTIONAL RIGHTS AND TO HAVE CAUSED COMPENSABLE INJURY ...' Wood vs. Strickland, 420 U.S., at 319, 95 S.Ct., at 999 (emphasis supplied by Court); (remaining citations omitted).

Carey, Id. at page 254-255. The court in Carey, rejected the argument that substantial damages should be awarded whether or not any injury was caused by a procedural due process deprivation

and dismissed the argument that a due process violation should be presumed to cause injury thus relieving a plaintiff from the necessity of proving actual harm. Id. at page 262. The Court held that plaintiff would be entitled to recover nominal damages (in Carey, the sum of $1.00), without proof of actual injury, but concluded that "substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights, Id. at 266.

C. Application to the instant case.

In the instant case, there was absolutely no testimony on the record from Respondent-Muth at any time during the course of the proceedings which could fairly be characterized as proof of actual damage suffered as a result of the procedural due process violations found by the Court. Nor was any evidence presented to

justify an award of punitive or exemplary damages. The lower courts justified the award of damages against the Commonwealth of Pennsylvania by concluding that if the due process procedure had not taken over one year, the parent could have reevaluated his decision to place Alexander at the Landmark School at his own expense. In drawing this conclusion, the lower courts presumed that actual injury occurred without requiring Respondent-Muth to produce testimony regarding the placement of his son at the Landmark School. Not only is such a conclusion unsupported by the evidence before the District Court, but the Court of Appeals ignored the fact that the parent had unilaterally removed his son from the School District prior to the first due process hearing. Moreover, after the School District's IEP for the 1983/84 school year had been approved by the Hearing Officer and Secretary of Education, the parent continued the Landmark School placement throughout the following year. The Court of

Appeals found that at least three months' delay in the due process hearing schedule was due largely, if not entirely, to the parent's own request for postponements, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988). Moreover, the imposition of the damage award totally ignored the fact that at all times, the Central Bucks School District had available an appropriate program of education for this child.

The Court of Appeals' justification for imposition of a damage award against the Respondent-District is even more difficult to understand. The Third Circuit concluded that an award of damages was appropriate against the School District because the IEP to which Respondent-Muth objected was found by the Hearing Officer to be inadequate. Such a conclusion is totally inconsistent with the facts. Respondent-Muth approved the March, 1983 IEP. Only after the District proposed to change the March, 1983 IEP and recommended Alexander's return to the resource room for all substantive

subjects, did Mr. Muth register a complaint and request a due process hearing. Thus, it was not the March, 1983 IEP that was challenged, but rather the recommendations made by the District in June, 1983 that the placement and program be changed. As stated previously, the District was prohibited from codifying its June, 1983 recommendations into an IEP until such time as directed by the Secretary of Education, 22 Pa. Code Section 13.32(22), 20 U.S.C. Section 1415(e)(3); 34 C.F.R. Section 300.513(a). In June, 1983, Respondent-Muth knew what the recommendations for the program and placement of his son for the 1983/84 school year would be, having met with the multi-disciplinary team to address specifically the District's concerns over Alexander's participation in the mainstreamed classes. Neither the Hearing Officer, the Secretary of Education, the District Court nor Court of Appeals determined that the recommendations first made to the parent in June, 1983 proposed an inappropriate

or inadequate program of education. On the contrary, those recommendations, which were ultimately embodied in an IEP, have been upheld throughout the course of these proceedings. Moreover, there is no testimony on the record from Respondent-Muth to suggest that the IEP to which he objected was the March, 1983 IEP. On the contrary, all of the evidence supports the conclusion that revision of the March, 1983 IEP was the subject of Muth's objections. Indeed, it was Muth himself who demanded that the March, 1983 IEP remain unrevised, Muth vs. Smith, 839 F.2d 113, 117 (3d Cir. 1988).

It is abundantly clear from the record that there is no justification for the award of damages against the School District. There was no testimony presented by Muth from which the Court could conclude that the removal of Alexander from the Central Bucks School District and his placement into the Landmark School program was in any way caused by any action or inaction on the part of the School District.

Nor was there testimony as to why Muth removed his son from the School District program. In the absence of such testimony, and in the absence of any proof of actual damage, only nominal damges may be awarded for a procedural due process violation, and those damages are appropriately assessed against the entity which caused the deprivation, in this case, the Commonwealth of Pennsylvania, Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed. 2d 52 (1978).

While tuition reimbursement has been determined to be appropriate where procedural due process violations have been found, damages have been assessed only against the entities actually responsible for causing the harm, Carey, Id., Hall v. Vance, 774 F.2d 629 (4th Cir. 1985); McKenzie v. Smith, 771 F.2d 1527 (D.C. Cir. 1985). Although in some cases a procedural due process violation might act to invalidate an otherwise appropriate IEP, the facts of each case must be closely scrutinized

to determine the nature and scope of the procedural due process violation, the harm to the plaintiff, and the identity of the party causing the harm, Burlington School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed. 2d 385 (1985); Cain vs. Yukon Public Schools, 775 F.2d 15 (10th Cir. 1985). Where the School District is found to have deprived a parent of procedural due process rights, invalidation of an IEP may be appropriate. However, in the case at bar, there is no evidence that the District acted to deprive Respondent-Muth of his procedural due process rights. If any deprivation of procedural due process rights occurred in this case, it was the result of an invalid statutory scheme enacted by the Pennsylvania Legislature and followed by the School District as required by State Law. There is no evidence on the record to suggest that the School District was responsible for the flawed due process system. Requiring the School

District to compensate Respondent-Muth for a procedural due process violation it did not cause, is an unjust result and not one contemplated by the Court in Burlington or by Congress in enacting the EHA, see also Rose vs. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817 (1985) (holding no attorney's fee award should be made against School District where plaintiff prevailed because state administrative process conflicted with federal law).

Thus, in the absence of any justification for the imposition of damages against the School District, the damage award must be vacated as to the School District.

CONCLUSION

For the foregoing reasons, Respondent-Central Bucks School District respectfully requests the Court to vacate the judgment of the Court of Appeals entered against it.

Joanne D. Sommer
Eastburn and Gray
60 East Court Street
Doylestown, PA 18901

Attorney for
Respondent-Central
Bucks School District

Dated: December 30, 1988

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Should *Hans* v. *Louisiana* be overruled and the Eleventh Amendment interpreted in accordance with its language?

2. Can a parent be reimbursed for tuition expenses he reasonably incurred in sending his handicapped son to a private, special needs school, while the administrative process was deciding what placement was appropriate?

3. Does the Education of All Handicapped Children Act (EHA), which was enacted to assure equal protection of the laws, abrogate states' immunity from suit?

4. Where the administrative procedures that were followed violated the EHA's rules concerning delay and partiality, was it permissible for the district judge to reimburse for resulting out-of-pocket expenses?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. THIS COURT SHOULD OVERTURN *HANS* v. *LOUISIANA* IN ORDER TO RECONCILE THE ELEVENTH AMENDMENT WITH ITS LANGUAGE AND ITS HISTORY	14
II. MUTH DESERVES REIMBURSEMENT UNDER THE EHA AND THE RULE OF *BURLINGTON SCHOOL COMMITTEE* v. *MASSACHUSETTS DEPARTMENT OF EDUCATION*	21
III. THE RULE OF *BURLINGTON* DOES NOT TURN UPON THE IDENTITY OF THE DEFENDANT	29
A. The 1986 Amendments To The Rehabilitation Act Expressly Abrogate State Immunity From Suits Brought Under The EHA	30
B. The Text Of The EHA As Enacted In 1975 Also Clearly Provides For Suit Against The States	32
C. Congress' Attempt To Define And Enforce Handicapped Children's Rights Under The Fourteenth Amendment Should Not Be Judicially Obstructed Through An Unthinking Application Of A Rule Of Construction Adopted Ten Years After The EHA Was Written	40

Table of Contents Continued

Page

IV. As An Alternate And Independent Matter, Muth Should Be Reimbursed For The Tuition He Paid During The Lengthy Delay In The Administrative Process That Was Caused By Petitioner's Violations Of EHA Procedures 44

A. This Court Need Not Reach The Partiality Issue Because Other Procedural Violations Which Have Been Established Below Are A Sufficient Basis For The Reimbursement That Was Ordered. 44

B. If This Court Addresses Impartiality, It Should Find That The Terms Of The EHA Remove The Act From The Administrative Law Paradigm And Disqualify The Secretary As A Reviewing Officer. 46

C. Violation Of The EHA's Impartiality Requirement Was Harmful To Muth And Tuition Reimbursement Is An Appropriate Remedy 51

Conclusion 55

Appendices 1a

TABLE OF AUTHORITIES

CASES: Page

Alamo Heights Independent School Dist. v. *State Bd. of Educ.*, 790 F.2d 1153 (5th Cir. 1986) 37

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) ..... *passim*

Burlington School Comm. v. *Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985) ..... *passim*

Burr v. *Ambach*, No. 88-7275, slip op., (2d Cir. Dec. 12, 1988) 50

Chevron U.S.A. Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984) 50

Chisholm v. *Georgia*, 2 U.S. (Dall.) 419 (1793) 14, 15

Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) 18

Colin K. by John K. v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983) 48

Community Television of S. Calif v. *Gottfried*, 459 U.S. 498 (1983) 43

Consolidated Rail Corp. v. *Darrone*, 465 U.S. 624 (1984) 43

Crawford v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983) 37

David D. v. *Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) 31, 39, 40

Doe by Gonzales v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub nom. Honig* v. *Doe*, 108 S. Ct. 592 (1988) 31

Edelman v. *Jordan*, 415 U.S. 651 (1974) 16, 17, 36

Employees of the Dep't of Pub. Health and Welfare of Missouri v. *Department of Pub. Health and Welfare*, 411 U.S. 279 (1973) 18, 32

Ex Parte Young, 209 U.S. 123 (1908) 16, 36

Fair Assessment in Real Estate Ass'n v. *McNary*, 454 U.S. 100 (1981) 20

Fitzpatrick v. *Bitzer*, 427 U.S. 445 (1976) 30, 42, 43

Ford Motor Co. v. *Department of the Treasury of Indiana*, 323 U.S. 459 (1945) 20

Garcia v. *Board of Educ. of Socorro Consolidated School Dist.*, 777 F.2d 1403 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986) 38

Gary A. v. *New Trier High School Dist. No. 203*, 796 F.2d 940 (7th Cir. 1986) 37, 38

Geis v. *Board of Educ.*, 774 F.2d 575 (3d Cir. 1985) .. 28, 52

Hall by Hall v. *Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985) 54

Table of Authorities Continued

Page

Hans v. *Louisiana*, 134 U.S. 1 (1890) ..... *passim*
Hendrick Hudson Bd. of Educ. v. *Rowley*, 458 U.S. 176 (1982) ..... *passim*
Honig v. *Doe*, 108 S. Ct. 592 (1988) ..... passim
Hutto v. *Finney*, 437 U.S. 678 (1978) 32
Jackson v. *Franklin County School Bd.*, 806 F.2d 623 (5th Cir. 1986) 45
Jenkins v. *Florida*, 815 F.2d 629 (11th Cir. 1987) 35
Matthews v. *Rodgers*, 284 U.S. 521 (1932) 19
Mayson v. *Teague*, 749 F.2d 652 (11th Cir. 1984) 53
McKenzie v. *Smith*, 771 F.2d 1527 (D.C. Cir. 1985) 52
Meyer v. *Nebraska*, 262 U.S. 390 (1923) 21
Mills v. *Board of Educ. of the Dist. of Columbia*, 348 F. Supp. (D.D.C. 1972) 51
Monahan v. *Nebraska*, 491 F.Supp. 1074 (D. Neb. 1980) 25
Muth v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988) 11, 44
Muth v. *Smith*, 646 F. Supp. 280 (E.D. Pa. 1986) 11, 44
Nevada v. *Hall*, 440 U.S. 410 (1979) 17
NLRB v. *United Food Workers Union*, 108 S. Ct. 413 (1987) 51
Osborn v. *Bank of United States*, 22 U.S. (9 Wheat.) 738 (1824) 17, 18
Parks v. *Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) 37
Pennhurst State School & Hospital v. *Halderman*, 465 U.S. 89 (1984) 19
Pennsylvania v. *Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988) (No. 87-1241) 14, 15, 18
Pennsylvania Ass'n for Retarded Children v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) 51
Pierce v. *Society of Sisters*, 268 U.S. 510 (1925) 21
Plyler v. *Doe*, 457 U.S. 202 (1982) 21
Poindexter v. *Greenhow*, 114 U.S. 270 (1885) 17
Procunier v. *Navarette*, 434 U.S. 555 (1978) 43
Pulliam v. *Allen*, 466 U.S. 522 (1984) 20
Quern v. *Jordan*, 440 U.S. 332 (1979) 32, 42
Railroad Comm'n of Texas v. *Pullman*, 312 U.S. 496 (1941) 20

Table of Authorities Continued

	Page
Rizzo v. *Goode*, 423 U.S. 362 (1976)	20
Robert M. v. *Benton*, 671 F.2d 1104 (8th Cir. 1982)	38, 49
San Antonio Independent School Dist. v. *Rodriguez*, 411 U.S. 1 (1973)	21
Smith v. *Reeves*, 178 U.S. 436 (1900)	20
Smith v. *Robinson*, 468 U.S. 992 (1984)	19, 22, 31, 39, 41
St. Louis Developmental Disabilities Treatment Center v. *Mallory*, 591 F. Supp. 1416 (W.D.Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985)	36
Sturges v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819)	20
Thompson v. *Thompson*, 108 S. Ct. 513 (1988)	16
Town of Burlington v. *Department of Educ.*, 736 F.2d 773 (1st Cir. 1984), *aff'd sub. nom. Burlington School Comm.* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985)	25
United States v. *Lee*, 106 U.S. 196 (1882)	17
Welch v. *Texas Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941 (1987)	17, 43
Will v. *Michigan Dep't of State Police*, 428 Mich. 540, 410 N.W.2d 749 (Mich. 1987), *cert. granted*, 108 S. Ct. 1466 (1988) (No. 87-1207)	39
Wisconsin v. *Yoder*, 406 U.S. 205 (1972)	21
Younger v. *Harris*, 401 U.S. 37 (1971)	20

CONSTITUTIONAL PROVISIONS:

Eleventh Amendment	*passim*
Fourteenth Amendment	*passim*

STATUTORY PROVISIONS:

20 U.S.C. § 1400	5, 11, 12, 22, 29, 31
20 U.S.C. § 1401	23, 28
20 U.S.C. § 1406	33
20 U.S.C. § 1411	33, 36
20 U.S.C. § 1412	*passim*
20 U.S.C. § 1413	33, 37, 39, 50
20 U.S.C. § 1414	33, 39, 50
20 U.S.C. § 1415	*passim*
20 U.S.C. § 1416	33, 37
20 U.S.C. § 1418	33

Table of Authorities Continued

Page

20 U.S.C. § 1419 33
29 U.S.C. § 794 ..... 30, 41, 42
29 U.S.C. § 794a 41
42 U.S.C. § 1983 ..... 20, 42
42 U.S.C. § 1988 32
42 U.S.C. § 2000 et seq 42
42 U.S.C. § 2000d-7(a)(1) 13, 30, 31
42 U.S.C. § 2000d-7(a)(2) 32
Pa. Stat. Ann. tit. 24, § 13.1376(a) 53

LEGISLATIVE HISTORY:

S. Rep. 168, 94th Cong., 2nd Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425 ..... 22, 31, 49, 51
S. Conf. Rep. 455, 94th Cong., 1st Sess. (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1480 ..... 45, 48, 49
H.R. Rep. 296, 99th Cong., 1st Sess. (1985) 34
120 Cong. Rec. 15269 (May 20, 1974) (remarks of Sen. Matthias) 22
121 Cong. Rec. (Nov. 19, 1975)
37415 (remarks of Sen. Williams) 34
37416 (remarks of Sen. Williams) 45
131 Cong. Rec. § 10398 (daily ed. July 30, 1985) 41
131 Cong. Rec. H9971 (daily ed. Nov. 12, 1985) 22, 41
132 Cong. Rec. H2425 (daily ed. May 7, 1986) 32
132 Cong. Rec. S9278 (daily ed., July 17, 1986) 41
132 Cong. Rec. S12096 (daily ed. Sept. 8, 1986) (remarks of Sen. Weicker) 32
132 Cong. Rec. S15101 (daily ed. Oct. 3, 1986) (remarks of Sen. Hatch) 32

REGULATORY PROVISIONS:

34 C.F.R. § 300.346 23
34 C.F.R. § 300.403 28
34 C.F.R. § 300.507 ..... 47, 53
34 C.F.R. § 300.511 45
34 C.F.R. § 300.512 ..... 45, 46

Table of Authorities Continued

	Page
34 C.F.R. § 300.550	28
1 Pa. Code § 35.241	46
22 Pa. Code § 1.1	48
22 Pa. Code § 13.11	28
22 Pa. Code § 13.32	44, 45, 48
BOOKS:	
The Federalist (C. Rossiter ed.) (1961)	18
C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* (1972)	14
H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* (1984)	15
S. Kirk & J. Gallagher, *Educating Exceptional Children* (1979)	29
C. Meisel, *Mainstreaming Handicapped Children* (1986)	29
J. Orth, *The Judicial Power of the United States* (1987)	14, 15
S. Shavell, *Economic Analysis of Accident Law* (1987)	40
ARTICLES:	
Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987)	14, 16
Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515 (1977)	14
Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suits Upon the States*, 126 U. Pa. L. Rev. 1203 (1978)	17
Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033 (1983)	14, 15, 17
Gibbons, *The Eleventh Amendment and State Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963)	14, 15
Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1 (1988)	14, 15, 16, 17
Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543 (1985)	19
Shapiro, *Wrong Turns: The Eleventh Amendment and the Pennhurst Case*, 98 Harv. L. Rev. 61 (1984)	19, 20

Table of Authorities Continued

Page

Van Pelt, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wisc. L. Rev. 1469 29

Wolcher, *Sovereign Immunity and the Supremacy Clause*, 69 Calif. L. Rev. 189 (1981) 16

MISCELLANEOUS:

Revised DAS Bulletin No. 107 Jan. 16, 1984), *reprinted in* Educ. Hand L. Rep. 203:19 (May 8, 1987) 50

Table of Abbreviations

CB = Central Bucks School District
J.A. = Joint Appendix
RA = Record Appendix (in three bound volumes as submitted by the state and CB to the Third Circuit Court of Appeals)

STATEMENT OF THE CASE

Alex's First Twelve Years

Robert Alexander Muth ("Alex") was born in 1970 and lived with his parents in Pennsylvania until he was 6 and his mother took Alex with her to her native country of Colombia, South America (J.A. 300). He was with his mother for more than three years (J.A. 301), then his father, the respondent, brought him back to Pennsylvania.[1] When he entered the Central Bucks school district ("CB") in 1980, Alex was a "tall, blond, tanned handsome boy who seem[ed] very self-conscious and unsure of himself"—a likeable 10 year old, who made friends easily and enjoyed sports (J.A. 304; RA II at 289). From the outset it was clear that he was learning disabled and that there was an unusually large disparity between his performance and verbal skills (J.A. 276, 286, 289-90). He had the short term memory typical of a child about half his age, could not write his name, and did not know months, days of the week, seasons, directions (RA II at 290).[2] "His uncertainty and difficulty seems to be accompanied by striking sensitivity, a kind of controlled, embarrassed frustration, and a somewhat depressed helpless manner" (RA II at 289).

At the outset it was recommended that Alex's placement for the coming year should provide "an extensive remedial speech and language experience, part of which will probably entail individual speech and language therapy . . . If feasible, private

---

[1] When Alex first returned, he did not speak English, but he relearned English quickly. From the beginning it was clear that his academic difficulties were not solely the product of his unfamiliarity with the English language (J.A. 307, 323; RA II at 289-90). As a witness for CB testified, his increasing familiarity with American language and culture may have been responsible for much of the limited progress Alex made while at CB (J.A. 352; RA II at 295).

[2] He had "striking difficulty in responding to even general questions and verbal situations. He is uncertain about identifying right and left sides, body parts, naming pictures or figures, responding to simple requests . . ." (RA II at 289).

school alternatives should be explored" (RA II at 291-92). "Time would seem critical, given his age, the evidence of superior nonverbal ability, and what appears to be a relatively severe language disorder and the very limited academic skills he now possesses" (RA II at 292).

Nonetheless Alex was sent to the public school, placed in Kutz Elementary School in the CB School District, in a learning disability ("LD") resource room (J.A. 274a). He was mainstreamed only for *non*-academic subjects: art, physical education, lunch, and recess with the 5th grade; music and library with the 4th grade (J.A. 274a). He was given few if any special services.[3]

From the first, Alex had difficulties adjusting to the special classrooms to which he was assigned, which over the next 3 years would include both classrooms classified as "LD resource room" and classrooms denominated "self-contained."[4] Alex reacted badly to being classified as a "special needs student" in a regular public school (J.A. 290-91). In March, 1981, the psychologist for the school district reported "Alex was . . . spontaneous and open in discussing his life experiences and concerns. A predominant theme [was] . . . his discomfort with being in a Special Education class, inquiry regarding how long he would have to remain in this environment and confusion

---

[3] The September 30, 1980 IEP lists only "speech" and does not specify whether it involved one on one instruction, how often it was offered, and whether the instructor was a specialist or simply the regular classroom teacher (J.A. 274a). Moreover, Muth requested but never received psychological counseling for Alex (J.A. 402-03).

[4] A witness for the school district described a self-contained classroom as "[an arrangement] where [Alex] basically stayed in that room for all of his major subject areas and only left that room for art, music, physical education" (J.A. 194). Alex was permitted more freedom of movement in a resource room since he "had the ability to move between the two different learning disability classrooms," (J.A. 190), but he remained separated from most of the children at the school, who were not handicapped.

about why he was there in the first place . . ." (J.A. 278-79). "Alex claims that he has lost potential friends because of his placement, as the other children tend to call him 'retarded'" (J.A. 279). "An undercurrent of loneliness and insecurity permeated Alex's responses and conversation . . . . [He has] a negative sense of self regard and its outward manifestation of being placed in a Special Education Program. He sees himself as a flawed child whose faults are the basis of major difficulties in his life and their remediation his prime concern at the present time" (J.A. 279-80).

The "'evidence of a poor or insecure self concept'" (J.A. 305) only increased during his tenure at CB. The next year the school psychologist reported "a young man with diminished self esteem as well as some depressive qualities" (J.A. 287). He "feels that he 'doesn't have any friends'" and in addition feels that "other children are 'smarter than me,'" "he wishes he were in the 'total regular class,'" says that "he thinks he is best 'at nothing,'" and "things would be better if 'I had a whole new life'" (J.A. 287). Indeed, because of his depression he had been mainstreamed at the Kutz School for two subjects in the fall of 1981, but "problems necessitated a return to the LD Program on a full time basis" (J.A. 285).[5] The school psychologist suggested "consideration [of] placement in a private school" and "strongly recommended" "involvement in a professional counseling milieu" (J.A. 287-88).[6]

Not only did Alex have persistent self image problems in the segregated special needs classrooms, but also his academic progress was very disappointing. In 1982 school authorities tested his IQ, and Alex scored 139 performance and 98 verbal,

---

[5] Alex experienced difficulty keeping pace in the regular class and was reluctant to perform in class (J.A. 285).

[6] The next year as well a school diagnostic consultant found a severely depressed youngster whose depression and lack of motivation interfered with his education (J.A. 290-92, 359).

for an overall IQ score of 120 (J.A. 284).[7] These results revealed very superior intellectual functioning in *non*-verbal areas, yet Alex remained a boy who "cannot say, sing or write the alphabet" without omitting five or six letters and mixing up the sequence; who cannot rhyme words; and who (at age 12) could not correctly write numbers beyond 36 or count orally beyond 50 (RA II at 236-39). Alex's low performance was not limited to testing situations; also "in general verbal interaction . . . he had difficulty framing sentences and retrieving information. Alex often appears to be frustrated in this regard . . ." (RA II at 295).[8]

Over the years, professionals had on occasion raised the possibility of private school placement, due to Alex's unusual profile, the severity of his language deficits, and his emotional discomfort with the separate classrooms for special needs children in the regular public school (J.A. 287-88, 354, 357; RA II at 292). The school district had not acted on these recommendations, citing the preference for educating handicapped youngsters with the nonhandicapped, a federal and state policy that favors mainstreaming (J.A. 228).

March 1983-September 30,1983—Mainstreaming, A Retreat, And An Impasse

The conflict that developed into litigation commenced in June 1983. Beginning in March, Alex had been mainstreamed for

---

[7] The extent of the disparity between these two measures of intelligence is highly unusual, and was not shared by any of the children in his LD classrooms at CB (J.A. 203-04).

[8] Not surprisingly Alex's high frustration level interfered with his learning (J.A. 290-92; RA II at 284). The school psychologist continued to report "a severe discrepancy between his ability and his academic achievement" (J.A. 291). By the spring of 1983, Alex, then 13, was reading at a 4.9 (high fourth grade) level, reading orally at only a third grade level, and earning a written language score of 3.9 (J.A. 310-11; RA II at 277), although he was "capable of understanding the *content* of age and/or grade level written material (J.A. 292)," and understood much better when read to orally (RA II at 278-84).

two academic subjects[9] in accordance with his continuing requests[10] and because his father was worried about the depression he was continuing to experience in the special needs classroom (J.A. 294-95), 363-64). CB agreed to the proposal—despite some skepticism that the mainstreaming could be successful (J.A. 374)—because of "Alex's current depressed emotional state . . . [and a] need for this child to feel some degree of normalcy" (J.A. 295, 359-60, 363, 387). By June all agreed that mainstreaming had again been unsuccessful (J.A. 365-66), but they could not agree upon what placement and what services should follow.

CB proposed returning Alex to the classroom setting he had been in until March, with no academic mainstreaming and a program similar to what had been provided from the outset (J.A. 218-220, 329-30, 378-79, 389; RA II at 220). Muth, knowing that program also had been unsuccessful, wanted to try something different: he exercised his parental right to participate in the selection of his child's educational placement, *see* 20 U.S.C. § 1400(c), by informing CB that he wished to educate his son outside of the district at Landmark School, a boarding school in Massachusetts that specializes in remediating language deficits similar to Alex's (J.A. 261-62, 272; RA I at 682-88, 703). Muth told CB that he did not think the education it was offering was "appropriate" within the meaning of the EHA, which guarantees every handicapped child a free and appropriate education (RA I at 277), *see* 20 U.S.C. § 1400(c). In accordance with federal law,[11] Muth asked that Alex's individual education plan ("IEP") (which the EHA mandates for each

---

[9] The school agreed to mainstream Alex in two academic subjects —English and science—while keeping him in the resource room for reading and math (J.A. 293a).

[10] Recently Alex had again expressed a desire to be "placed in the 'team'" for instruction in various subjects (J.A. 291, 359-60, 363-64, 371).

[11] *See* 20 U.S.C. § 1415(e)(3).

handicapped child) not be altered pending the hearing officer's decision (RA II at 300); that was his position until September 6 when he asked that school officials meet with him to prepare an IEP after all (J.A. 331).

During the summer Muth tried to arrange an appropriate education for Alex for the coming school year. In September Alex attended CB for two days and then enrolled at Landmark. The due process hearing was held on September 30.

September 30-October 31—The Due Process Hearing And Decision

The hearing officer, Vernard Trent, heard testimony about Alex's problems adjusting to the public school (J.A. 344, 349, 357), his problems of self image and depression (J.A. 346, 359-60, 363-64, 366-67), the limited progress he had made (J.A. 361, 376, 395), and the difficulty he had encountered getting services (J.A. 337-38, 340-41, 377, 383, 387-88, 392-93, 398-99). Muth also testified that his son was doing better at Landmark, which was more specialized than the CB classrooms (J.A. 407-08). Alex did make significant academic progress at Landmark, learning for the first time such important skills as how to express himself in writing (J.A. 259-60, 322-23; RAI at 692). Landmark seemed also to be dealing successfully with Alex's emotional problems RA III at 466, 486-87, 491-92, 498, 501, 508, 509-11).

Trent's decision, rendered October 31, validated Muth's concerns with the CB placement. He concluded "[t]he program (SD-2, SD-5) advocated by the school district is appropriate relative to classification [learning disabled] but inappropriate relative to effectiveness and efficiency" (J.A. 424-25). It appears that the hearing officer considered Landmark the preferable placement,[12] although he did not actually

---

[12] In recommending a more restrictive environment, the hearing officer referred to materials describing Landmark's program (P2), as well as to two reports that recommend private placement (J.A. 423). CB's Exception 11 to Trent's decision suggests it believed Trent had ordered placement at Landmark: the "Hearing Officer improperly accepted the recommendations of Dr. Adamson for private school placement of the student" (*See infra* p. 2b.).

order it.[13] Instead he gave as his Recommendation A:

> That the Central Bucks School District, immediately, meet with the parents of Robert Alexander Muth to discuss and explore alternative placement in a more restrictive educational setting according to 22 Pa. Code 13.11. The student has not made appreciable gains in reading (SD-10, N.T.60) and socio-emotional difficulties seemingly have been exacerbated by the current placement (N.T. 22-23-74-88-89-102-133-156-157-166, SD-14). Programmatic changes have not alleviated the emotional distress or facilitated the acquisition of the necessary academic, social, and vocational skills. (J.A. 425)

In any event Trent unambiguously found that the proposed program did not adequately meet Alex's needs for remedial services, which Muth also sought in the hearing, as he had over the years.[14] Trent found, for example, that "[a]lthough the speech and language IEP (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities" (J.A.

---

[13] Perhaps the reason is that Pennsylvania law seems to require that the hearing officer give only a recommendation and not an order *(RA I at 243)*, although that procedure seems clearly illegal under the EHA, *see* 20 U.S.C. § 1415(b) (Pet'n for Cert. at 92a). Another possible reason is that Muth, proceeding pro se, had not perceived the necessity of introducing actual evidence concerning the appropriateness of Landmark so as to make an affirmative case for placement there, as the school district repeatedly noted. The only evidence Muth introduced was his own testimony and the report of a psychiatrist who had done a thorough study and recommended Landmark (RA I at 41). In finding the proposed program inappropriate, Trent relied primarily upon evidence CB introduced, consisting mostly of testimony of the district's own employees.

[14] The hearing officer found that Muth had experienced difficulty getting services provided, for example: "Alexander [whose problem all agree is auditory perceptual dysfunction] had been in the Central Bucks School District two and one half (2½) years before receiving a central auditory processing evaluation (N.T. 164)" (J.A. 417). The school finally agreed to provide the auditory exam only because of "parental insistence" (J.A. 420).

speech and language IEP (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities" (J.A. 421); that there remained a "significant lag in scholastic achievement" (J.A. 419), despite strong intellectual functioning (J.A. 418-419, 423); and that social and emotional concerns had not been adequately addressed: "Behavioral success and adjustment was not evident in either the self contained room nor the resource room" (J.A. 422). Accordingly, Trent recommended, in addition to Recommendation A above, that "the significant auditory perceptual dysfunction addressed through the speech and language IEP be translated into instructional strategies and classroom activities (SD-3-SD-4)," (Recommendation B) (J.A. 426), that "socio-emotional difficulties be addressed through intensive counseling" (Recommendation C) (J.A. 426), that vocational counselling be explored (Recommendation D) (J.A. 426), and finally that the program developed address Alex's "potential to function within the mentally gifted range and provide special activities or services not ordinarily provided in the regular program . . . ." (Recommendation E) (J.A. 426), thus addressing Alex's strengths as well as his deficits.

January-October 1984—The Secretary Of Education's Review and Remand

Both parties filed exceptions to Trent's decision, and the attorney for CB informed Muth that the recommendations would not be followed until the review process was completed *See infra* p. 1a.[15] Two months later, on January 23, 1984, the then Secretary of Education ruled that because Trent had not

---

[15] CB further contended that "the progress made by Robert Alexander Muth . . . was superior" (CB Brief in Support of Exceptions at 5). This stance was identical to CB's position at the hearing—that Alex was receiving an appropriate education (J.A. 332, 334, 405). At the hearing, a representative of CB concluded that "[Alex] is making excellent progress with the program we have implemented for him" (RA II at 61 See also R.A. II at 41).

found the district *unable* to provide an appropriate education, he would remand to the school district and give it another chance to produce an appropriate plan (J.A. 435-37).

The secretary rationalized this approach by saying that the hearing officer had not passed on the appropriateness of the plan the school district proposed in *June* of 1983 (RA II at 220) and had only passed on the appropriateness of a program like the March IEP calling for academic mainstreaming (J.A. 435). He so found even though when Trent found "the program was appropriate relative to classification but not relative to efficiency . . ." he cited to both the March IEP (SD-2) *and* the June recommendation that academic mainstreaming be abandoned (SD-5) (J.A. 424).[16] Moreover, both Trent's findings described above and the transcript of the hearing (J.A. 378-79, 389; RA II at 32, 49, 58) show the issue was the adequacy of the school district's proposal for the next year and not simply the propriety of academic mainstreaming (on which the parties were in agreement.)[17]

---

[16] The June recommendation provides in full: "Alex would benefit from increased involvement in the LD program. Continue to monitor Alex for appropriate areas for mainstreaming. IEP revisions to occur in September" (RA II at 220). Moreover, in its brief in support of exceptions to the hearing officer's report, CB wrote that it had "discharged its burden of introducing both the March, 1983 program and its recommendations for the 1983-84 school year" (CB Brief in Support of Exceptions at 3). (*See also* J.A. 219-20, 338, 378-79 (putting in issue the IEP that would be in effect).) Finally, Trent stated that he had four different IEPs before him (J.A. 415).

[17] The school district has occasionally tried to create the impression that Muth *prevented* it from preparing an appropriate IEP by exercising his statutory right not to have the placement changed pending litigation. This explanation ignores Muth's September 6, 1983 request that they go forward (J.A. 331). More fundamentally, the inability to change an IEP (which can never be done without the parents' consent or an administrative or judicial order) does not bar a school authority from proposing an appropriate program at the hearing, and a hearing officer can order any program proposed by any party or even some

The Secretary thus sent Muth through another round in the administrative process. On March 28, the school team met and made proposals for a revised IEP (RA II at 333-34); on April 26 they met with Muth and heard his suggestions and objections (RA II at 336-37); on May 1 they embodied their proposal, which reflected some of Muth's suggestions, into a proposed IEP (RA I at 36; RA II at 338); and on July 24, 1984 that IEP was upheld as appropriate by Vernard Trent—the same hearing officer who had found for Muth the previous October (J.A. 463-64). Trent found in July that "the *substantial adjustments* (SD-18) to the IEP and program offered . . . *now* describe an appropriate program of special education" (emphasis added) (J.A. 464).[18] The next October the Secretary of Education upheld Trent's July ruling "that the modifications and adjustments which [CB] . . . made to the March 28, 1984 IEP constituted an appropriate program," (RA I at 223), and the controversy finally moved out of the administrative process and into the courts.

Judicial Review

Muth had objected earlier that he should not have to undergo a second round of the administrative process (RA I at 294), and in April, 1984, he filed a complaint in the federal district court for the Eastern District of Pennsylvania against both CB and the state educational agency (J.A. 10). In June, 1986, the court granted Muth's motion for summary judgment, holding that

---

plan that he himself creates. For the 1986-87 school year, for example, the school district introduced a proposed program that Muth had not approved, and that did not reflect the status quo (J.A. 233). Nonetheless, that plan was subsequently held appropriate (Pet'n for Cert. at 182a-83a).

[18] Earlier he said, "The conclusions of law delineated in the September 30, 1983 hearing remain intact with the following exception; the *adjustments* to the IEP *now coalesce* to indicate an educational program (SD-18) which appears to be effective and efficient . . ." (emphasis added) (J.A. 463).

Pennsylvania had violated the EHA in three ways: first, the original appeal to the Secretary was illegal because a decision rendered by a state hearing officer, as was the October 1983 decision, cannot be administratively reviewed under the terms of the EHA, *see* 20 U.S.C. § 1415(e)(1); second, the Secretary should not have been permitted personally to hear the appeal because he was an employee of the state educational agency and therefore not impartial as that term is defined in the EHA; and third, the Secretary's remand was illegal under the Act, which requires that the decision of a reviewing officer be "final", 20 U.S.C. § 1415(e)(1). *See Muth* v. *Smith*, 646 F. Supp. 280, 284-85 (E.D.Pa. 1986).

In a separate opinion, the district court held that the revised IEP that CB proposed in April, 1984 would have provided an appropriate education for Alex (Pet'n for Cert. at 156a). Nevertheless, it found both CB and the Commonwealth liable for reimbursement of the tuition Muth had paid for the 1983-84 school year, because "[t]he flaws in the administrative process applied in this case caused the whole process to drag on for over a year" (Pet'n for Cert. at 165a-166a). It rejected the petitioner's defense that the Eleventh Amendment barred a reimbursement award against it (Pet'n for Cert. at 177a).

The Third Circuit affirmed the award of reimbursement for 1983-84 tuition, concluding that the district court could reimburse Muth because the delays in the administrative process which caused the expenses were due to the illegal remand and also because the Secretary was not an impartial reviewing officer. *See Muth* v. *Central Bucks School Dist.*, 839 F.2d 113, 123-25 (3d Cir. 1988). Pet'n for Cert. at 48a-49a). Further, it agreed that the EHA abrogates the Eleventh Amendment, and that the state was liable for reimbursement. *See id.* at 128-30.

SUMMARY OF THE ARGUMENT

This case arises under the Education for all Handicapped Children Act, 20 U.S.C. §§ 1400 et. seq. (the "EHA"). The central substantive purpose of the Act is to assure that all

handicapped children be provided "a free appropriate public education which emphasizes special education . . . designed to meet their unique needs . . ." 20 U.S.C. § 1400. As this Court observed in *Board of Education* v. *Rowley*, 458 U.S. 176, 205 (1982), the Act's substantive goals are largely achieved through "the elaborate and highly specific procedural safeguards embodied in § 1415."

On one level this case concerns reimbursement of tuition paid by a father searching for an appropriate education for his handicapped son. But on another level, it involves the question whether children with handicaps will receive the education Congress has promised them. It also concerns whether parents of handicapped children can participate effectively in decisions concerning their child's education.

The respondent placed his son in a private special needs school while the administrative process was determining what placement was appropriate for him. The case differs from this Court's unanimous *Burlington School Committee* decision because here a program that the school district proposed was ultimately held to be appropriate, and the school district was thereby relieved of the obligation to finance the private placement. But the school district's program in this case was not held appropriate until July 1984, and the tuition reimbursement that the lower courts have ordered covers only the academic year that ended before then. Moreover, the school district proposal that was eventually held appropriate was not even formulated until the end of April, when the academic year was drawing to a close. When the proposal was upheld, it was *called* the "1983-1984 IEP," but it was not available for that school year. Accordingly, Muth deserves reimbursement under the principle of *Burlington*.

Alternatively one can justify the reimbursement award on the theory explicated by the courts below and award tuition reimbursement based on petitioner's substantial violations of EHA procedures. The EHA requires that each state recipient institute a specific system of procedural safeguards through

which the substantive rights conferred by the Act are to be defined, *see* 20 U.S.C. § 1415; the procedures used by Pennsylvania in Alex's case directly violated the EHA and produced not a definition of Alex's rights, but rather delay and partiality. *See* Part IV.

The EHA establishes rules that are somewhat unusual for administrative agencies; it specifically mandates that hearing and review be conducted by an impartial decisionmaker, see 20 U.S.C. § 1415(b)(2), who is not "an employee of such agency . . . involved in the education or care of the child." Nonetheless, Pennsylvania permitted its Secretary of Education—the state official directly in charge of its school system—to adjudicate Muth's dispute with the school district. In addition, the Secretary substantially delayed the decisionmaking by remanding the case, in direct contravention of the Act's requirement of "finality." The partiality and extended delay prevented Muth from obtaining a prompt resolution. It is only for the period of illegal delay that Muth has been awarded tuition reimbursement.

To grant reimbursement against the state petitioner, of course, this Court must hold that the EHA abrogates Eleventh Amendment immunity. This presents no obstacle, however, since Congress enacted the EHA pursuant to § 5 of the Fourteenth Amendment and clearly stated its intent to abrogate immunity. *See* Part III. In 1986 Congress removed any doubt from the issue by passing the Rehabilitation Act amendments, which specifically abrogate the Eleventh Amendment in suits brought under any statute which, like the EHA, "prohibit[s] discrimination by recipients of Federal financial assistance." 42 U.S.C. § 2000d-7(a)(1). In so doing, Congress merely reiterated what had already been clear. As enacted in 1975, the EHA was an ambitious federal-state cooperative program premised on ultimate state responsibility. *See, e.g.*, 20 U.S.C. § 1412(6). Most important, it expressly gave parents an enforceable right of action in federal court against the only possible parties in EHA suits—local school districts and the states. *See* 20 U.S.C. § 1415(a), (b), (c), (e)(2).

ARGUMENT

I. THIS COURT SHOULD OVERTURN *HANS* v. *LOUISIANA* IN ORDER TO RECONCILE THE ELEVENTH AMENDMENT WITH ITS LANGUAGE AND ITS HISTORY.

This case, like *Pennsylvania* v. *Union Gas Co.*, 832 F.2d 1343 (3d Cir. 1987), *cert. granted*, 108 S. Ct. 1219 (1988) (No. 87-1241), argued earlier this Term, presents the Court with the opportunity to rationalize the basis of its Eleventh Amendment-sovereign immunity doctrine. With a unanimity that is rare among legal academics, scholars agree that "Eleventh Amendment theory" is flatly inconsistent with the language and history of the amendment and does not make sense.[19] Moreover, what is known of the intent of the enacters clearly accords with the language of the amendment and not with the construction that currently prevails.

Recent scholarship makes clear that the Eleventh Amendment, enacted in response to *Chisholm* v. *Georgia*, 2 U.S. (Dall.) 419 (1793), was intended to remove the jurisdiction of the federal courts in cases brought against a state by citizens of

---

[19] *See, e.g.*, C. Jacobs, *The Eleventh Amendment and Sovereign Immunity* 150-64 (1972); Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1466 (1987) ("the Court has misinterpreted the Federalist Constitution's text, warped its unifying structure, and betrayed the intellectual history of the American Revolution that gave it birth."); Fletcher, *A Historical Interpretation of the Eleventh Amendment*, 35 Stan. L. Rev. 1033, 1034 (1983) ("[a]s a historical matter [the Court's] view of the amendment is mistaken."); Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 125-26 (1988); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. Pa. L. Rev. 515, 538-46 (1977); Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 Colum. L. Rev. 1889, 1891 (1983); *see generally* J. Orth, *The Judicial Power of the United States* (1987).

another state.[20] Some of the Constitution's framers had not considered Article III to grant that jurisdiction, but in *Chisholm* the Court held it did make that grant, in its "state-citizen diversity clause." The Eleventh Amendment was promptly enacted to overturn that ruling.

The plain meaning of the Eleventh Amendment's words accords with this history, and the amendment was applied in accordance with this construction for ninety-five years after its enactment, *see* Brief for Resp. at 20-21, *Union Gas*, *supra* p. 14, until the Supreme Court in *Hans* v. *Louisiana*, 134 U.S. 1 (1890), adopted the interpretation that has since prevailed.[21] *Hans* was a clear departure from both the language and the intended meaning of the Eleventh Amendment.

From two holdings in *Hans*—that the Eleventh Amendment enacts a principle of states' sovereign immunity and that it applies equally to cases that are not included within the amendment's terms—this Court over the years has built a complicated and elaborate jurisprudence that has produced universal criticism.[22] *Stare decisis* might be sufficient reason to adhere

---

[20] *See, e.g.*, Amar, *supra* note 19, at 1467-84; Fletcher, *supra* note 19, at 1034 ("[T]he amendment merely required a narrow construction of constitutional language affirmatively authorizing federal court jurisdiction and [] the amendment did nothing to prohibit federal court jurisdiction."); *see also id.* at 1045-63; Gibbons, *supra* note 19, at 1920-41; Jackson, *supra* note 19, at 13-51; J. Orth, *supra* note 19, at 28-29 (advocating a return to the plain meaning of the text).

[21] *Hans* was an expedient solution to the problem the Court faced in enforcing monetary judgments against Southern states shortly after Reconstruction. *See* Gibbons, *supra* note 19, at 1973-2002; J. Orth, *supra* note 19, at 79-81, 153-60.

[22] *See, e.g.*, H. Fink & M. Tushnet, *Federal Jurisdiction: Policy and Practice* 137 (1984) (noting "the theoretical incoherence of eleventh amendment jurisprudence"); Fletcher, *supra* note 19, at 1044 ("The result of the Court's expansive reading of the scope of the eleventh amendment's prohibition and of the Court's use of fictions

to those holdings were it not for the extremely awkward and occasionally absurd theoretical framework that *Hans* has necessitated. The reason to overturn *Hans* is precisely to clarify and rationalize both Eleventh Amendment jurisprudence and the law of states' immunity. No *results* need change with the overturning of *Hans*, for the Court if it wishes can accomplish precisely the same results on a nonconstitutional level through its doctrine of comity. The results in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), and the Eleventh Amendment clear statement cases, for example, could be grounded upon a general judicial reluctance to find implied rights of action against the states, *see, e.g.*, *Thompson* v. *Thompson*, 108 S. Ct. 513, 520-23 (1988) (Scalia, J., concurring in the judgment).[23]

---

and exceptions to limit the impact of that prohibition is a complicated, jerry-built system that is fully understood only by those who specialize in this difficult field."); Amar, *supra* note 19, at 1473 (stating, with regard to the Court's present interpretation of the Eleventh Amendment: "All of this is, in a word, nonsense."); Wolcher, *Sovereign Immunity and the Supremacy Clause*, 69 Calif. L. Rev. 189, 195, 197, 210-12 (1981) (remarking that the "curious rules" of the Eleventh Amendment and an "elaborate structure of fiction and artifice" force plaintiffs to "negotiate . . . through judicial avoidance doctrines."); Jackson, *supra* note 19, at 119 (calling *Hans* and its progeny "a body of law that has for many years been rightly condemned as anomalous and inconsistent, both internally and with respect to the basic constitutional norms by which we like to believe we are governed").

[23] The rule of *Edelman* v. *Jordan*, 415 U.S. 651 (1974), could survive, so that states would remain responsible for prospective relief, because they have no legitimate interest in refusing to comply with the demands of the Federal Constitution once it is established what those demands are, *see Ex parte Young*, 209 U.S. 123 (1908), but they would remain responsible for retroactive relief such as damages only when Congress has explicitly addressed the need to hold their treasuries accountable. That may not be the only balance that could be struck between federal and state interest, but it is one reasonable resolution, providing a discernible line between the allowable and the

Chief Justice Rehnquist once stated that sovereign immunity must be of constitutional dimension, even though it is not literally included in Article III or the Eleventh Amendment, because "[its] derogation would undermine the logic of the constitutional scheme." *Nevada* v. *Hall*, 440 U.S. 410, 439 (1979) (Rehnquist, J., dissenting).[24] But if sovereign immunity

---

forbidden. That line has a long and relatively consistent progeny dating from the earliest applications of sovereign immunity doctrine, *see Poindexter* v. *Greenhow*, 114 U.S. 270 (1885); *United States* v. *Lee*, 106 U.S. 196 (1882); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). Although the Court could of course reexamine this or any other aspect of sovereign immunity theory, there is no reason the *Edelman* rule cannot survive under a comity approach to sovereign immunity as readily as under a constitutional one.

[24] Similarly, four Justices in *Welch* v. *Texas Dep't of Highways and Pub. Transp.* 107 S.Ct. 2941 (1987), expressed fear that rejecting the *Hans* rationale would overrule "at least 17 cases, in addition to *Hans* itself," *id.* at 2956 n.27. In fact, the change in rationale need overturn none of those holdings, all of which could be upheld under doctrines of "Our Federalism" and comity that this Court has already adopted. *See, e.g.*, Jackson, *supra* note 19, at 119-24 (explaining how a rejection of *Hans'* rationale does not compel overturning any of the cases listed by the plurality in *Welch);* Fletcher, *supra* note 19, at 1131 (arguing that acceptance of the historical view "may not significantly change the actual results that are now achieved. But, even in those cases where the actual result is not greatly different, [following the historical understanding] may permit us to see more clearly what is at issue and to ask directly questions about the extent of federal power to provide remedies against unconsenting states that are now asked covertly and awkwardly. The achievement in the short run may not be so much practical as intellectual. But what is at stake may be more than that, for in the long run, the integrity and possibly the stability of our legal system depend in important part on the ability of the judiciary to understand and articulate the real grounds for its decisions,"); Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. Pa. L. Rev. 1203, 1261-80 (1978) (explaining why overturning the rule of *Hans* would not require different results in any of the Supreme Court's cases.)

were protected under the same or similar doctrines counselling judicial restraint before holding states liable, especially for retroactive relief, it is difficult to see how the scheme would be disrupted.[25] Indeed even the result in *Hans* itself could remain, on the ground that the Constitution does not create a federal cause of action to enforce the Contract Clause. *See, e.g., Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 299-300 (Brennan, J., dissenting); Field, *supra* note 24, at 1265-68.

At most overturning *Hans* will alter the tone of the analysis, allowing the Court to reach its results by speaking through the doctrine of comity, which is arguably more sensitive and adapt-

---

[25] Logic would suggest that the chief consequence of whether or not immunity is constitutionally based would be whether or not Congress, acting under its Article I powers, can lift the states' immunity without their consent. But this Court has followed the practice of imputing consent to the states whenever Congress validly exercises its power to regulate, *see Employees of the Dep't of Pub. Health and Welfare of Missouri* v. *Department of Pub. Health and Welfare*, 411 U.S. 279, 283-84 (1973), and if that continues, there already is no difference in result between the constitutional and the judicial restraint rationales for immunity. Indeed in the area of congressional waiver, it is the *Hans* theory of the Eleventh Amendment as a bulwark of sovereign immunity that threatens to "undermine the logic of the constitutional scheme," for if sovereign immunity is the states' constitutional right, how can Congress waive it? But to deny that Congress has power to subject a state to suit in the federal courts under legislation enacted pursuant to Article I would be in direct conflict with one of the most fundamental tenets of the Constitution: that the power of Congress and the federal courts is coextensive. *See* Brief for Resp. at 28-31, *Union Gas*, *supra* p. 14; *see also Osborn* v. *Bank of the United States*, 22 U.S (9 Wheat.) 738, 818-19 (1824); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 391-92 (1821); *The Federalist* No. 80, (C. Rossiter ed. 1961) at 476 (A. Hamilton) ("If there are such things as political axioms, the propriety of the judicial power of a government being coextensive with its legislative may be ranked among the number.").

able to current needs. As Professor Shapiro has said, speaking of this Court's decision in *Pennhurst State School and Hospital* v. *Halderman*, 465 U.S. 89 (1984),

> [T]he eleventh amendment and sovereign immunity are inappropriately blunt instruments for dealing with these delicate matters . . . . Other, more precise instruments better suited to cope with those problems were available to the Court—in particular, nonconstitutional doctrines of restraint based on principles of deference to a state's interest in administering its own laws and in having a fair opportunity to interpret those laws when their meaning is in doubt.

Shapiro, *Wrong Turns: The Eleventh Amendment and the* Pennhurst *Case*, 98 Harv. L. Rev. 61, 79 (1984). The added flexibility of a comity approach might better address the appropriate balance between federal and state interests than would a more rigid constitutional doctrine.[26] *Smith* v. *Robinson*, 468 U.S. 992 (1984), provides an example of the advantages of retaining a certain flexibility in this area. In that case, the federal district judge had certified state law questions to the state supreme court in order to avoid inconsistency with federal law; the state court construed its law, under threat of obvious federal illegality, to avoid the federal issues. This Court noted that, because of *Pennhurst*, it was wrong of the district court to award relief under state law, *see id.* at 1002 n.6. That result belies considerations of federal-state comity; following the *Pennhurst* rule in such situations would force a judge to hold a state law unconstitutional, whereas the sensible

---

[26] *See Matthews* v. *Rodgers*, 284 U.S. 521, 525 (1932) (noting that the principle of comity expresses "[t]he scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations"); *see also* Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 580-85 (1985) (defending federal courts' use of comity to decline to hear cases within their jurisdiction in order to avoid undue interference with states).

solution sometimes is to resolve state law questions—or even as here to let the state resolve them through certification.[27]

A comity doctrine could be sufficiently flexible to allow the court to respond to factors involved in each case. Principles of federal judicial restraint in regulating state government can be applied on a case by case basis, allowing the particular balance of state and federal interests to control, *see, e.g., Rizzo* v. *Goode*, 423 U.S. 362, 378-80 (1976); *Fair Assessment in Real Estate Assn.* v. *McNary*, 454 U.S. 100, 107-13 (1981), or it can be used to evolve a set of rules that will apply in a category of litigation, as this Court has done in *Younger* v. *Harris*, 401 U.S. 37 (1971) and progeny, and in the category of rules it has devised to govern officials' immunity in § 1983 actions, *see, e.g., Pulliam* v. *Allen*, 446 U.S. 522 (1984).[28]

In *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 202-203 (1819), Chief Justice Marshall wrote:

---

[27] Nonetheless the *Pennhurst* rule, like all of the Court's rules developed under the name of constitutional sovereign immunity, would presumably continue under a comity theory. Indeed, the principal *Pennhurst* holding—that federal courts cannot hold states accountable in suits brought by private individuals on the basis of state law—in some ways seems simply a reformulation of the familiar rule of *Smith* v. *Reeves*, 178 U.S. 436 (1900). Despite *Pennhurst*, a state that affirmatively consented to suit, under the stringent requirements of *Ford Motor Co.* v. *Department of Treasury of Indiana*, 323 U.S. 459 (1945), is still amenable to federal jurisdiction on the basis of federal law; *Smith* v. *Reeves* holds that states can consent to suits against themselves and limit their waiver of immunity to state court. Clearly a federal court should take jurisdiction over a state cause of action by a private individual against the state only with a state's explicit waiver of its immunity in federal court—the rule that prevails under *Smith* v. *Reeves* and the rule of *Pennhurst* as well.

[28] *Pullman* abstention, *see Railroad Comm'n of Texas* v. *Pullman*, 312 U.S. 496 (1941), is another product of judicially-created comity.

> [I]f, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

Recent scholarship has demonstrated that, far from being a monstrous absurdity, the Eleventh Amendment means what it says and constitutes a straightforward withdrawal of jurisdiction in the suits the amendment names.

Decision of *this* case, in any event, should be the same whether or not *Hans* is overturned, for Congress acting under the Fourteenth Amendment, where it plainly has power to abrogate states' immunity, has clearly expressed its intention that states should be liable to reimburse parents who have had to pay for an appropriate education for their handicapped child. The Education of the Handicapped Act satisfies the clear statement requirement whether that rule is viewed as constitutionally compelled or whether it results from considerations of comity.

II. MUTH DESERVES REIMBURSEMENT UNDER THE EHA AND THE RULE OF *BURLINGTON SCHOOL COMMITTEE* v. *MASSACHUSETTS DEPARTMENT OF EDUCATION*.

1. Rather than leave to courts difficult constitutional questions regarding the educational rights of handicapped children[29] and the rights of their parents to participate in decisions about that education,[30] Congress took the initiative in the

---

[29] *Compare Plyler* v. *Doe*, 457 U.S. 202 (1982) (Equal Protection Clause requires access to an education) *with San Antonio Independent School Dist.* v. *Rodriguez*, 411 U.S. 1 (1973) (Equal Protection Clause does not require an *equal* education).

[30] *Cf. Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

EHA.[31] As reenacted in 1975, the EHA "establishes an enforceable substantive right to a free appropriate public education." *Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984). Through federal-state cooperation, Congress sought to achieve two goals: to "assure that all handicapped children have available to them . . . a free appropriate public education," and to protect "the rights of . . . parents or guardians" to participate in the determination of what education is appropriate for their child. *See* 20 U.S.C. § 1400(c). The second of these goals is both important in its own right[32] and as a means of enforcing the child's right to appropriate education.[33]

---

[31] *See, e.g.*, 1975 S.Rep. 168, 94th Cong., 1st Sess., at 9, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1433 ("It is this Committee's belief that the Congress must take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided equal educational opportunity. It can no longer be the policy of the Government to merely establish an unenforceable goal of requiring all children to be in school."); 120 Cong. Rec. 15269 (remarks of Sen. Matthias) ("why should the Congress stand idly by while court action is heaped upon court action? *Why should we leave it up to the judicial branch to affirm the Constitution?*") (emphasis added).

[32] *See Honig* v. *Doe*, 108 S.Ct. 592, 598 (1988) (noting that while "aware that schools had all too often denied such children appropriate educations without in any way consulting their parents, Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness"); 131 Cong.Rec. H9971 (daily ed. Nov. 12, 1985) (remarks of Rep. Miller) ("Parents' involvement in the education of the handicapped child is not only essential to the task, it is a right specifically included in the law.").

[33] *See* 1975 S.Rep. 168, 94th Cong., 1st Sess., at 11-12, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1435-36 ("By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child involvement . . ., the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.").

The pivotal nature of the parental role arises from the process by which the education appropriate for each child is determined. Congress wisely eschewed attempting to formulate a single substantive standard of education for the wide spectrum of handicapped children whom the Act protects. *See Hendrick Hudson Dist. Bd. of Educ.* v. *Rowley*, 458 U.S. 176, 189 (1982).[34] Yet, recognizing that "schools had all too often denied such children appropriate educations," Congress also refused to grant school systems unfettered discretion to decide what education to provide each child. *See Honig* v. *Doe*, 108 S. Ct. 592, 598 (1988); *see also id.* at 604. Instead, "[t]he 'free appropriate public education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP)." *Rowley*, 458 U.S. at 181-82 (*quoting* 20 U.S.C. § 1401(18)). The IEP is a product of a cooperative effort among the educational agency, the teacher, the parents, and the child. *See id.* at 182. It specifies not only the child's placement but also what services he will receive and with what frequency. *See* EHA Services, 34 C.F.R. § 300.346 (1987). Parental participation makes a substantive contribution because parents know their child in a way that school officials do not; the sharing of both perspectives is designed to produce an educational program that is more suitable than either could produce alone.

Parental participation is also a central enforcement mechanism of the Act. *See Rowley*, 458 U.S. at 208-209. Recognizing

---

[34] Any attempt to formulate such a standard would undermine the individualized consideration that is indispensable to the proper education of a child. This Court has also declined to formulate a test:

> The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between.

Rowley, 458 U.S. at 202.

that parents and school officials would not always agree about what education is appropriate, "Congress . . . establishe[d] various procedural safeguards that guarantee parents . . . an opportunity for meaningful input into all decisions affecting their child's education." *Honig*, 108 S.Ct. at 598. Most important, the state must establish a system for impartial "due process review" of the child's program to which parents may appeal in the event of disagreement with school officials. *See* 20 U.S.C. § 1415(a), (b). And if parents remain dissatisfied with the program after exhausting this administrative review, they may file a complaint in either federal or state court, which can conduct de novo review and "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2).

2. In *Burlington School Committee* v. *Massachusetts Dep't of Educ.*, 471 U.S. 359, 370 (1985), the Court held that courts may in an appropriate case award tuition reimbursement to parents for expenses reasonably incurred during the process of review. The parents in *Burlington* were not content with the program the town offered, and while they challenged that placement they enrolled their son in a program they thought more suitable. *See id.* at 362. After extensive litigation, their view of the appropriate IEP was ultimately vindicated and they were awarded reimbursement of their out of pocket expenses in educating their child. *See id.* at 370, 374.

The *Burlington* Court unanimously rejected the contention that the EHA authorizes only prospective relief, holding instead that the availability of tuition reimbursement is necessary to achieve the Act's substantive goals. If tuition reimbursement were unavailable, the Court stressed,

> the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. . . . Congress undoubtedly did not intend this result. . . .

Id. at 370. Without the possibility of reimbursement, many parents would have no choice but to leave their child in an inappropriate placement throughout the "ponderous" process

of review, and the child's and parents' rights would go unenforced.[35] Children with handicaps are not "nonperishable commodities" whose development can be put on hold while the litigation runs its course. *See Town of Burlington* v. *Department of Educ.*, 736 F.2d 773, 798 (1st Cir. 1984).

Moreover, if reimbursement were unavailable, the scheme of the Act would be severely disrupted because parents would be forced to seek review of the child's educational program or placement in the courts through preliminary injunctive relief. That relief would often be necessary to prevent harm to their child from languishing in an inappropriate placement. *See, e.g.*, *Monahan* v. *Nebraska*, 491 F.Supp. 1074, 1090-94 (D. Neb. 1980) (granting preliminary injunctive relief). For courts to rule first on these issues, however, would bypass the administrative process which Congress sought to establish as the usual first step in resolving such disputes.

3. Muth's claim for reimbursement falls within the *Burlington* rule even though the IEP first formulated on April 26, 1984 was *called* the 1983-84 proposal and was eventually held appropriate, because that plan was not available to Alex during the 1983-84 school year. In the autumn of 1983, when Alex started attending Landmark, the program the school district was proposing was substantially different from the April 26 proposal, *see supra* p. 10, and was inappropriate, as Hearing Officer Trent found, *see supra*, pp. 7-8.[36]

---

[35] If only prospective relief were available, parents would be discouraged from pursuing relief through the administrative process, for the most they could expect would be an "empty victory [of having] a court tell them several years later that they were right but that these [tuition] expenditures could not . . . be reimbursed." *Burlington*, 471 U.S. at 370.

[36] Whether the product of partiality in the proceeding or of simple negligent error, the Secretary's later statement that Trent had passed only on the plan for academic mainstreaming is not defensible on the merits. Not only did Trent cite to the June proposal to place

Nor is this a case where the school district, once informed of the deficiencies in its proposed program, was willing to correct them. CB specifically informed Muth it would not follow Trent's recommendations pending its appeal,[37] and it also took the position, in the due process hearing (J.A. 332, 334; RA II at 61) and after it, that the education it had offered in the past was perfectly adequate, indeed it was "superior."[38] Even if the school district was *able* to offer an adequate education at that

---

Alex in a more restrictive classroom setting in the public school when he held the school proposal inappropriate (*see, e.g.*, J.A. 424), but also the testimony of the witnesses shows they knew that more than academic mainstreaming was at issue (*see, e.g.*, J.A. 378-79; 389; RA II at 32, 49, 58). Indeed the parties agreed concerning the impropriety of academic mainstreaming (J.A. 365-66). Moreover, Trent also made findings as to inappropriateness that covered the *range* of classrooms Alex had attended at CB; for example, he found Alex suffered "emotional disturbance[s]" and referred to his experiences in the learning disabled classroom (SD-12, SD-13) as well as the school district's effort to mainstream (SD-14) (J.A. 423). It is indisputable that Trent found that certain services should be offered that had not been part of the program before (J.A. 426). Yet the June recommendation that the Secretary intimated might be adequate contained no suggestion that any new services would be provided (RA II at 220); the recommendation, which is set out in full above at note 16, does not speak to providing services at all but only to discontinuing the academic mainstreaming. No fair reading of Trent's October decision could conclude that he was simply ordering a return to the LD classroom in the public school.

[37] On November 28, 1983, the school district informed Muth that "[t]he district is under no obligation to implement any of the recommendations of the hearing officer until such time as the exceptions have been ruled upon." *Infra* p. 1a.

[38] *See Brief in Support of Exceptions* at 5. In its exceptions to the hearing officer's recommendations, the school district continued to maintain that "its proposal was both appropriate and adequate." *Infra* p. 3b.

time, it was not *willing* to do so.[39] Surely until another plan was proposed, Alex did not have the alternative of an appropriate education at CB. At least until April 26, 1984 (J.A. 207; RA I at 459, 462),[40] Muth had no reasonable alternative but to continue Alex's placement at Landmark.

Nor is there any question that in the absence of an adequate proposal by the school district, the Landmark placement met the requirements of appropriateness. The thrust of the school district's position was not that there was anything wrong with Landmark, but rather that the services Alex received there were unnecessary in light of the purported appropriateness of

---

[39] Often a private school placement is necessary not because the school district *could not* meet the child's needs itself but because it *is not in fact* responding to the particular needs of the child. The reasons may be justifiable. Sometimes it does not make sense for each town to provide an appropriate education in its own schools for every child, no matter how unusual his learning profile. It may be more sensible for several communities to share resources and create an appropriate program or even to use a specialized private school to meet the need. Because instead of being community-based it serves children with like needs, a private school may be able to offer specialized services that are not available in a program serving a more diverse population. In other situations, the public schools could reasonably provide appropriate special education but do not; one accomplishment of the private school alternative is that it creates an incentive for school districts themselves to provide a richer format of programs so as to become truly suitable to a wider range of special needs children, where that is feasible.

[40] Even if Muth had instantly appreciated that the school district proposal now met the threshold of adequacy, it would not be appropriate to expect him instantly to remove his handicapped child from Landmark, where he had been having a successful year, rather than allow him to complete the last 6 weeks of the academic year. The tuition reimbursement that has been awarded covers only reimbursement for the period from September 14, 1983 until June 16, 1984. See p. 1c.

the program offered by Central Bucks.[41] Indeed the district court said that the Landmark program was "excellent and . . . may even be the best program for Alexander," and doubted only its necessity since the EHA does not require the "best" education but only an adequate one (Pet'n for Cert. at 182a-83a).[42] The only questions ever raised about the Landmark placement were (a) whether it was necessary in light of the availability of the program at Central Bucks and (b) whether placement there was undesirable given the statutory preference for mainstreaming (J.A. 228, 486b).

Of course, CB was not proposing mainstreaming either. But, technically, a separate school for special needs children, like Landmark, is considered a less desirable, "more restrictive" placement than a separate classroom in a "regular" public school. *See* 34 C.F.R. § 300.550(b)(1) (1987); 22 Pa. Code § 13.11. For Alex, however, the separate special needs classroom contributed to a feeling of stigmatization and a loss of self esteem and hampered his ability to learn (J.A. 181). If a child *needs* a "more restrictive placement" in order to learn, then that placement "meet[s] the unique needs of [this] handicapped child" and provides the "special education" the EHA requires. *See* 20 U.S.C. § 1401(16), (18); *Geis* v. *Board of Educ.*, 774 F.2d 575, 583 (3d Cir. 1985) (preference for mainstreaming does not

---

[41] The statute provides for more restrictive private placement at public expense only when the school authorities do not have another appropriate proposal. *See* EHA Services, 34 C.F.R. § 300.403(b) (1987); 22 Pa. Code § 13.11.

[42] Indeed some of the school district witnesses themselves testified that Landmark is an excellent school for children who need language-based programs (J.A. 234-35). CB's program, in contrast, was not languaged-based (J.A. 421; RAI at 721). Much of the evidence indicated that Landmark was generally better suited to Alex's needs (J.A. 454-55; RA I at 695, 721, 723). Interestingly, in designing the 1986-87 IEP for Alex, CB borrowed the set of educational objectives that Landmark had employed in its 1983-84 IEP (RA I at 511-12) as well as a number of other features (RA I at 738).

trump requirement that education be appropriate for individual child).[43]

In sum Muth is entitled to reimbursement under the principle of *Burlington* because he reasonably incurred tuition expenses to obtain appropriate education for his son while the administrative process unfolded.

III. THE RULE OF *BURLINGTON* DOES NOT TURN UPON THE IDENTITY OF THE DEFENDANT.

Pennsylvania may not avoid its responsibility for reimbursement. *Burlington's* holding that the EHA authorizes reimbursement is dispositive regardless of whether the defendant is a state agency or a local school district because the EHA abrogates the states' Eleventh Amendment immunity. Congress enacted the EHA pursuant to § 5 of the Fourteenth Amendment,[44] and it is well-settled that, "when acting pursuant to § 5 of the Fourteenth Amendment, Congress can

---

[43] *See* C. Meisel, *Mainstreaming Handicapped Children* (1986); S. Kirk & J. Gallagher, *Educating Exceptional Children* (1979). Even though mainstreaming was not suitable for Alex, it can of course be beneficial, depending upon how it is structured, and also upon the personality and the disability of the particular child. When it is appropriate, it serves the interests not only of enabling the handicapped to gain experience functioning in the "normal" world, but also of lowering the barriers of segregation and allowing the non-handicapped to become acquainted with the handicapped.

[44] *See, e.g.*, 20 U.S.C. § 1400(b)(9) (stating that the EHA was passed "in order to assure equal protection of the law"); *see also* Van Pelt, *Compensatory Educational Services and the Education for All Handicapped Children Act*, 1984 Wisc. L. Rev. 1469, 1495-1500 (collecting references to equal protection in the legislative history of the EHA and concluding that "it is highly unlikely that the EAHCA may be viewed as anything other than a Section 5, fourteenth amendment enactment."). Pennsylvania does not contest that the EHA represents an exercise of Congress' enforcement power under the Fourteenth Amendment. *See* Brief of Pet. at 30.

abrogate the Eleventh Amendment without the States' consent." *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234, 238 (1985) (*citing Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 456 (1976)). Congress manifested its intent to abrogate immunity by clearly stating so both in the 1986 amendments to the Rehabilitation Act and in the EHA and by establishing an elaborate federal-state cooperative program to define and enforce the Fourteenth Amendment rights of handicapped children—a program whose purposes require state liability for reimbursement.

Congress manifested its intent that states not be immune from suits under the EHA with sufficient clarity to satisfy the standard established in *Atascadero*. In *Atascadero*, the Court held that in order for a statute to subject states to suit, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." 473 U.S. at 243. Applying this standard, the Court concluded that § 504 of the Rehabilitation Act (as codified at 29 U.S.C. § 794)—which nowhere specifically mentioned states—did not possess "the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment." *Id.* at 245-46. Unlike the Rehabilitation Act at issue in *Atascadero*, the EHA contains the necessary "unequivocal statutory language."

A. The 1986 Amendments To The Rehabilitation Act Expressly Abrogate State Immunity From Suits Brought Under The EHA.

In 1986, Congress made states liable for tuition reimbursement to the parents of handicapped children. It did so by amending the Rehabilitation Act to overturn *Atascadero* with the following provision:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29 . . . *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.*

42 U.S.C. § 2000d-7(a)(1), Pub. L. 99-506, Title X, § 1003, Oct. 21, 1986, 100 Stat. 1845 (emphasis added). Because the EHA

"prohibit[s] discrimination by recipients of Federal financial assistance," this amendment expressly abrogates state immunity from suits for tuition reimbursement brought under the EHA. *See* 42 U.S.C. § 2000d-7(a)(1).[45]

It is clear that the EHA falls within the amendment's language. First, it prohibits discrimination against handicapped children. Indeed, the preamble of the Act states that its purpose was "to provide programs to meet the educational needs of handicapped children in order *to assure equal protection of the law.*" 20 U.S.C. § 1400(b)(9) (emphasis added).[46] Second, the EHA imposes this duty to prohibit discrimination on states choosing to receive federal financial assistance.[47] If the EHA is

[45] Although there is a conflict among the circuits concerning whether the EHA abrogates the Eleventh Amendment, *compare, e.g., David D.* v. *Dartmouth School Comm.*, 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986) (holding that EHA abrogates immunity) *with, e.g., Doe by Gonzales* v. *Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd on other grounds sub nom. Honig* v. *Doe*, 108 S. Ct. 592 (1988) (holding that EHA does not abrogate immunity), none of the circuits has addressed the effect of this amendment to the Rehabilitation Act on sovereign immunity.

[46] *See also, e.g., Smith* v. *Robinson*, 468 U.S. 992, 1010 (1984) (*quoting* S.Rep. No. 94-168, p. 13 (1975)) ("It is the intent of the [Senate] Committee to establish and protect the right to education for all handicapped children and to provide assistance to the States in carrying out their responsibilities under State law and the Constitution of the United States to provide equal protection of the laws."); *Rowley*, 458 U.S. at 189 ("[T]he face of the statute evinces a congressional intent to bring *previously excluded handicapped children* into the public education systems of the [participating] States.") (emphasis added).

[47] *See, e.g., Honig* v. *Doe*, 108 S. Ct. 592, 597 (1988) ("[T]he EHA confers upon disabled students an enforceable substantive right to public education in participating states and conditions federal financial assistance upon a state's compliance with the substantive and procedural goals of the Act.") (citation omitted); *Rowley*, 458 U.S. at 180-81 (*quoting* 20 U.S.C. § 1412 (1)) ("In order to qualify for *federal financial assistance* under the Act, *a State must demonstrate that it 'has in effect a policy that assures all handicapped children the right to a free appropriate public education.'*") (emphasis added).

not a "Federal statute prohibiting discrimination by recipients of Federal financial assistance," no federal statute is.[48] Therefore, this amendment must abrogate state immunity from EHA suits; otherwise, its last clause would be rendered meaningless.[49]

B. The Text Of The EHA As Enacted In 1975 Also Clearly Provides For Suit Against the States.

The text of the EHA as enacted in 1975 reveals a congressional intent to abrogate states' immunity from suits for tuition reimbursement. The EHA is replete with references to the

---

[48] This amendment—which was passed by a unanimous vote in both Houses, *see* 132 Cong.Rec. S15101 (daily ed. Oct. 3, 1986) (remarks of Sen. Hatch); *id.* at H2425 (daily ed. May 7, 1986)—reflects Congress' intent in enacting the EHA originally in 1975. *See, e.g., id.* at S12096 (daily ed. Sept. 8, 1986) (remarks of Sen. Weicker, floor sponsor of amendment) (stating the amendment "*clarifies the intent of Congress* where violations of section 504 by recipients of Federal financial assistance are concerned. [It] provides that states shall not be immune under the 11th amendment from suit in Federal court for violations of section 504 of the Rehabilitation Act, *or other Federal statutes prohibiting discrimination.*") (emphasis added). Although the amendment became effective after Muth initially filed suit, *see* 42 U.S.C. § 2000d-7(a)(2), the overwhelming support for the amendment shows that it reflects Congress' intent in originally enacting the EHA. In any event, the clear language of the amendment settles the issue of state immunity from EHA suits for all future cases.

[49] *Cf. Hutto* v. *Finney*, 437 U.S. 678, 698 n.31 (1978) (holding that 42 U.S.C. § 1988 evinced a congressional intent to abrogate state immunity in part because "[i]f the Act does not impose liability for attorney's fees on the States, it has no meaning with respect to them."); *Quern* v. *Jordan*, 440 U.S. 332, 345 (1979); *Employees of Dep't of Pub. Health and Welfare of Missouri* v. *Department of Pub. Health and Welfare*, 411 U.S. 279, 285-86 (1973).

states,[50] and by its terms it (1) subjects the states to suit, (2) contemplates the necessity for state liability for reimbursement, and (3) places on states overall responsibility for the Act's administration.

1. Unlike *Atascadero*, where the statutory language at issue did not include mention of states, this case involves a statute which expressly subjects states to suits in federal court. Section 1415 of the EHA provides for a detailed system of procedures designed to safeguard the rights of handicapped children and their parents. In its first opportunity to interpret the EHA, the Court described the § 1415 procedure as follows:

> [T]he Act imposes extensive procedural requirements upon *States* receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§ 1415(b)(1)(D) and (E). Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. §§ 1415(b)(2) and (c). Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint . . . in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2) [ellipses in Court's opinion].
>
> *Thus, although the Act leaves the States the primary responsibility* for developing and executing educational

---

[50] *See, e.g.*, 20 U.S.C. §§ 1400(b)(8), (b)(9); 1401(a)(6); 1406(a); 1411(a)(4), (a)(5), (b)(1), (b)(2), (c)(1), (c)(2), (c)(3), (c)(4), (d), (e)(2), (g)(1), (g)(2); 1412(1), (2), (3), (4), (5), (6), (7); 1413(a)(1), (a)(2), (a)(4), (a)(5), (a)(9), (a)(12), (b), (c); 1414(a), (b)(1), (b)(2), (b)(3), (c)(1), (c)(2), (d), (e), (f); 1415(a), (b)(2), (c), (e)(3); 1416(a), (b)(1); 1418(a); 1419(a), (b).

> programs for handicapped children, *it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured [in part] . . . by the provision for judicial review.*

Rowley, 458 U.S. at 182-83 (emphasis added) (footnotes omitted).[51] This recognition that "the provision for judicial review" contemplated state defendants in district courts in order to assure compliance is buttressed by the fact that the only *possible* parties in an EHA dispute are "handicapped children and their parents," "any local educational agency," and "[a]ny *State* educational agency." *See* 20 U.S.C. § 1415(a) (emphasis added); *see also* 20 U.S.C. § 1415(b), (c).[52]

2. The EHA does not merely subject states to suit in federal court; it also imposes liability on them for "such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). A unanimous Court in *Burlington* had no doubt that this language encompassed and contemplated tuition reimbursement:

---

[51] *See also* 1985 H.R. Rep. 296, 99th Cong., 1st Sess., at 6 ("[I]n some actions in which the parents or guardian prevail, more than one local or *State* agency may be named as respondent") (emphasis added); 121 Cong. Rec. 37415 (remarks of Sen. Williams) (primary author of the EHA) ("In addition, it should be clear that a parent or guardian may present a complaint alleging that a *State* or local educational agency has refused to provide services to which a child may be entitled") (emphasis added).

[52] Petitioner artfully employs ellipses to remove from 20 U.S.C. § 1415 the clear references to states and to their inclusion as proper defendants in actions brought by parents. *See* Brief of Pet. at 37. Petitioner has radically altered the meaning of § 1415(e)(2) by substituting the phrase "[made in the administrative process]" for the provisions which call attention to subsections (b) and (c)—the subsections which expressly include the states as authorized defendants—and by deleting altogether the provisions referring to the original filing of a complaint by the parents against the state or local agencies. *See id.* By its actual terms, § 1415(e)(2) instructs that it be considered in conjunction with the remainder of § 1415; together they clearly and expressly contemplate federal suits brought by private plaintiffs against state defendants.

> Absent other reference, the only possible interpretation [of these words] is that the relief is to be "appropriate" in light of the purpose of the Act.
>
> . . . [If reimbursement were not available,] the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete [emphasis in original]. Because Congress undoubtedly did not intend this result, *we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.*

471 U.S. at 369-70 (emphasis added).[53] In conclusion, the Court stressed that "[t]he Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." *Id.* at 372.

Moreover, the meaning of "appropriate" relief must not turn upon the identity of the defendant. Irrespective of whether the defendant is a local or state agency, "appropriate" relief must be interpreted "in light of the purpose of the Act." *Id.* at 369. And the possibility of reimbursement from some party is necessary to achieve this purpose. *See id.* at 369-70. Consequently, fashioning a distinction between local agencies and state agencies, and making the former liable for tuition reimbursement and the latter immune—a distinction made nowhere in the EHA—would undermine the purposes of the EHA in the many situations in which reimbursement will not be available from a local defendant.[54]

---

[53] Reimbursement, of course, is a remedy to be granted not automatically but only after "balancing the equities of the particular case." *Jenkins* v. *Florida*, 815 F.2d 629, 631 (11th Cir. 1987).

[54] In a struggle to distinguish *Burlington*, petitioner claims that the right to a free appropriate education could be complete without the prospect of tuition reimbursement from the state and that construing "appropriate relief" to allow only prospective relief would

The EHA itself contemplates that local defendants will not be involved in all cases. Often it either permits or requires the states directly to run a special education program without the participation of local agencies. First, the state is required only to expend seventy-five percent of its EHA funding through local agencies; it can administer the other twenty-five percent itself. *See* 20 U.S.C. § 1411(c). In Missouri, for example, the state educational agency directly administers the schooling of at least 3000 handicapped children. *See St. Louis Developmental Disabilities Treatment Center* v. *Mallory*, 519 F. Supp. 1416, 1421 (W.D.Mo. 1984), *aff'd*, 767 F.2d 518 (8th Cir. 1985). Moreover, a state is permitted under § 1411 to select a group of handicapped children—for example, the severely retarded or the emotionally disturbed—and regulate their education itself. *See, e.g., id.* (noting that "profoundly handicapped youngsters" are educated in Missouri state schools). Second, a state is not *permitted* to employ a local agency in the event that the local agency is entitled to less than $7500 of EHA funds[55] or when the local agency has not submitted the complex application or detailed plan as required by § 1414. *See* 20 U.S.C. § 1411(c)(4)(A). In all these situations, the state *must* run the EHA program itself. *See* 20 U.S.C. § 1411(c)(4)(B).[56] Reimbursement

---

adequately protect the interests of handicapped children. *See* Brief of Pet. at 53-54. This argument applies equally to suits where the defendant is a local agency and is the precise argument that this Court unanimously rejected in *Burlington*, *see* 471 U.S. at 370. Moreover, if petitioner were correct, it would not have been necessary for Congress to have provided *any* statutory authorization for suit against states; prospective relief would be available under *Ex parte Young*, 209 U.S. 123 (1908), and *Edelman* v. *Jordan*, 415 U.S. 651 (1974), even without any congressional action.

[55] Under Pennsylvania's figures, this results when the area served by the local agency contains fewer than twenty-five to thirty handicapped children. *See* Brief of Pet. at 51 n.11.

[56] It is thus possible under the Act for a state to structure the local agencies in such a way that many of them not be entitled to EHA

would then be wholly unavailable if the state were immune; and "the child's right to a *free* appropriate public education . . . would be less than complete." *Burlington*, 471 U.S. at 370 (emphasis in original).

Even in situations in which a local agency can be named as a defendant, reimbursement against the state is still necessary, for five reasons, to achieve the EHA's goals. First, the EHA requires that the state ensure that local agencies meet the Act's provisions. *See* 20 U.S.C. § 1412(6). If the states were immune from suit, they would lose their incentive to force localities to comply.[57] *See generally infra* pp. 38-39. Second, challenges to implementation of the EHA sometimes involve only a challenge to state policy,[58] thus rendering it inappropriate to hold

funds, thereby permitting the state to control those funds directly. *Cf. Gary A.* v. *New Trier High School Dist. No. 203*, 796 F.2d. 940, 945 n.9 (7th Cir. 1986) ("Illinois could have established a single state agency to control all public education instead of establishing local school districts. By doing so it might have conferred eleventh amendment immunity on that agency."); *See Amicus* Brief of ACLU *et al.* at 8-9.

[57] States now sometimes join with the parent in suing the locality to force compliance with the EHA. *See, e.g., Alamo Heights Independent School Dist.* v. *State Board of Education*, 790 F.2d 1153 (5th Cir. 1986). The threat that the Secretary of Education might withdraw funding pursuant to 20 U.S.C. § 1416 is not sufficient to ensure state vigilance. The Secretary is not charged with detecting individual violations, and it is not likely that even clear violations in isolated cases of which he was aware would lead to withdrawal of funds, *see* 20 U.S.C. 1416(a)(1) (providing that the Secretary's power to withhold funds attaches when "there has been a failure to comply *substantially* with any provision of section 1412 or section 1413") (emphasis added). The mechanism to ensure an appropriate education in *every* case is instead the elaborate IEP procedure, with its provisions for administrative and judicial review. *See supra* pp. 23-24.

[58] *See, e.g., Parks* v. *Pavkovic*, 753 F.2d 1397 (7th Cir. 1985) (challenging state policy of making the "developmentally disabled" contribute to costs of residential placement); *Crawford* v. *Pittman*, 708 F.2d 1028 (5th Cir. 1983) (challenging state policy of providing no more than 180 days of education per year).

the locality liable.

Third, given the states' control over the implementation of the EHA, in many cases the state, and not the local agency, will be responsible for an inappropriate IEP; if the state were immune, however, only the locality would be sued.[59] The local agency could then claim, as CB does in this case, that *it* did nothing to deprive the child of his right under the EHA and should not be forced to bear the monetary burden of remedying the state's violation. If the local agency could thus escape liability for reimbursement by pinning the blame for its default on an immune state, the potential would exist for an end run around *Burlington*.[60]

Fourth, in certain situations, the local agency itself may be considered an arm of the state for Eleventh Amendment purposes. *See, e.g., Garcia* v. *Board of Educ. of Socorro Consolidated School District*, 777 F.2d 1403, 1407 (10th Cir. 1985), *cert. denied*, 107 S. Ct. 66 (1986). If the state were immune, the availability of reimbursement could vary according to how the state structures its educational system. *See Gary A.* v. *New Trier High School Dist. No. 203*, 796 F.2d 940 n.9 (7th Cir. 1986). This would impermissibly allow states to extend their own sovereign immunity under the Act and would irrationally place the effect of *Burlington* at their disposal. Fifth, if states were immune and no other defendant were available, parents could obtain preliminary injunctive relief in court, thus vitiating the EHA's procedural scheme. *See supra* pp. 25.

---

[59] *Cf. Robert M.* v. *Benton*, 671 F.2d 1104, 1105 (8th Cir. 1982) (state and school district are both defendants even though alleged violation resulted from state procedures).

[60] Unlike CB (which did not offer Alex an appropriate education at least until April 26, 1984), sometimes the school district may be correct that it shares none of the blame, as in the cases cited *supra* note [58]. In those cases, the choice would be between denying any reimbursement and holding the locality responsible for the state's default.

In all of the above situations, the possibility of tuition reimbursement from the state was intended by Congress and is necessary to realize the EHA's goals.[61] For "conscientious parents who have adequate means . . . it would be an empty victory to tell them several years [after they sent their child to private school] that they were right but that [their] expenditures could not . . . be reimbursed," and this would deny to their child a free appropriate education. *See Burlington*, 471 U.S. at 370. This is a result that "Congress undoubtedly did not intend." *Id.*

3. Finally, Congress' manifest intent to abrogate state immunity is evinced by the entire structure of the EHA. The *state* must develop a plan for the education of the handicapped. *See, e.g.*, 20 U.S.C. § 1413. The *state* must implement and effectuate that plan, *see, e.g.*, 20 U.S.C. § 1412(1), (3), (5), and establish procedural safeguards, *see, e.g.*, 20 U.S.C. § 1415(a). The *state* must monitor the localities' compliance with provisions of that plan and oversee the operation of the procedural safeguards. *See, e.g.*, § 1414(b). And it is the *state* that is fully responsible for guaranteeing the substantive rights conferred on handicapped children and their parents by the EHA. *See* § 1412(6); *see also Smith* v. *Robinson*, 468 U.S. at 1010 ("The

---

[61] Nor does the availability of reimbursement from the state in state court, which the EHA would seemingly impose, *but cf. Will* v. *Michigan Dep't of State Police*, 428 Mich. 540, 410 N.W.2d 749 (Mich. 1987), *cert. granted*, 108 S.Ct. 1466 (1988) (No. 87-1207) (argument heard on October 31, 1988 and decision pending), permit an interpretation of "appropriate relief" that exempts states from liability in federal court. The intent of the EHA is to allow the parties an unfettered choice between state and federal court by allowing the identical action in each forum—the statute, and § 1415 in particular, nowhere distinguishes between the remedies available in different courts. As the First Circuit has noted, "we do not think Congress envisioned having handicapped children's plans subject to double legal standards depending solely upon the aggrieved party's choice of forum." *David D.* v. *Dartmouth School Comm.*, 775 F.2d 411, 419 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986).

responsibility for providing the required education remains on the States.").

Given the clear congressional reliance on massive state involvement and ultimate state responsibility, it does not make sense to interpret the statute so that local agencies are liable but states are immune. The system plainly cannot work unless the state does its job. Yet petitioner's proposed interpretation would cause the responsibility to devolve upon the localities in violation of Congress' intent, for it would remove the incentive for the state to perform its monitoring and enforcement roles.[62] "[S]ince the state is responsible for guaranteeing that a child will receive both the substantive and procedural rights set forth in the Act, Congress intended that the state should be named as an opposing party, if not the sole party, to the proceeding." *David D.* v. *Dartmouth School Comm.*, 775 F.2d 411, 422 (1st Cir. 1985), *cert. denied.*, 475 U.S. 1140 (1986).

C. Congress' Attempt To Define And Enforce Handicapped Children's Rights Under The Fourteenth Amendment Should Not Be Judicially Obstructed Through An Unthinking Application Of A Rule Of Construction Adopted Ten Years After The EHA Was Written.

This Court has never held that a statute like the EHA, which *specifically authorizes* federal courts to adjudicate cases involving state defendants, does not abrogate states' sovereign immunity. Especially because the EHA was enacted under the Fourteenth Amendment, any such holding would be a radical departure from existing precedents.

The Rehabilitation Act at issue in *Atascadero*—the strictest case on the clear statement requirement and the case on which

---

[62] From an economic perspective, a situation where one party has both the duty to monitor and the power to control the activities of another party presents the paradigmatic case for vicarious liability irrespective of the apportionment of blame. *See* S. Shavell, *Economic Analysis of Accident Law* 170-71 (1987).

petitioner principally relies—was substantially less clear than is the EHA in expressing a congressional intent to abrogate state immunity.[63] At the time of *Atascadero*, § 504 of the Rehabilitation Act provided that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, . . . be subjected to discrimination under any program or activity receiving Federal assistance," 29 U.S.C. § 794, and it authorized handicapped persons subjected to such discrimination to bring suit in federal court, *see* 29 U.S.C. § 794a. But nowhere did the statute mention the possibility of states' being named as defendants. In those circumstances, the *Atascadero* Court rejected the argument that because the states received federal financial assistance, § 504 abrogated states' immunity. *See* 473 U.S. 245-46.

The EHA, by contrast, specifically contemplates the possibility of complaints brought by parents against state agen-

---

[63] Nevertheless, the rule of construction announced in *Atascadero* did not produce an accurate assessment of congressional intent. Congress superseded the decision in *Atascadero* by enacting—by a unanimous vote, *see supra* note 48—the Rehabilitation Act amendment discussed *supra* pp. 30-32. Similarly, in *Smith* v. *Robinson*, 462 U.S. 992 (1984), the Court, applying standard rules of construction, concluded that Congress did not intend for the EHA's elaborate scheme of procedures and remedies to be supplemented by those of the Rehabilitation Act and also applied rules of construction to hold that the EHA did not allow for awards of attorney's fees. Both of these holdings were swiftly and expressly overturned by Congress when it amended the EHA in 1986. *See* 20 U.S.C. § 1415(e)(4), (f) (as amended, Aug. 5, 1986). The history of these provisions and amendments reflects that Congress genuinely does intend to be generous in providing education to the handicapped—a service which many recognize as highly cost-effective in the long term, and which also is what the handicapped most require in order to redress their disability. In enacting the provision allowing attorney's fees in EHA actions, Congress showed an awareness that its provision would cost states money, and they nonetheless chose to impose this financial obligation. *See, e.g.*, 132 Cong. Rec. § 9278 (July 17, 1986); 131 Cong. Rec. H9971 (Nov. 12, 1985); 131 Cong. Rec. § 10398-99 (July 30, 1985).

cies, and it does so in the very section in which it authorizes parents to file those complaints in United States district courts. *See* 20 U.S.C. §§ 1415(a), (b), (c), (e)(2); *see also supra* pp. [32-35].[64] This creation of federal jurisdiction, moreover, is located in the same subsection as the authorization for federal courts to grant "appropriate" relief against the states, *see* 20 U.S.C. § 1415(e)(2), an authorization which this Court has held encompasses awards of retroactive reimbursement, *see supra* pp. 24-25. A statute enacted pursuant to the Fourteenth Amendment which contains this degree of clarity of intent to make states liable abrogates state immunity. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 451-56 (1976).[65]

Further, in *Atascadero*, there was no danger that a holding that Congress had not abrogated the states' immunity would undermine the operation of the Rehabilitation Act. Unlike the EHA, under which the *only possible* defendants in a discrimination suit are state and local agencies, the Rehabilitation Act prohibits discrimination under "any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. The states themselves are but a subset of such programs or activities; many entities besides states and besides governments may find

---

[64] Petitioner's reliance upon *Quern* v. *Jordan*, 440 U.S. 332, *see* Brief of Pet. at 31-33, which held that 42 U.S.C. § 1983 does not abrogate state immunity, fails to appreciate the significance of the express authorization of suits against the states in the EHA's text. Section 1983, by contrast, does not mention—even indirectly—states as possible defendants. *See Quern*, 440 U.S. at 345.

[65] The authorization of suits against states in federal courts in the EHA is much more explicit than that in Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. § 2000 *et seq.*, which this Court unanimously held to have abrogated the states' immunity, *see Fitzpatrick*, 427 U.S. at 452. In *Fitzpatrick*, the Court followed the clear meaning of Title VII in holding that it abrogates state immunity, even though it neither mentions the Eleventh Amendment nor refers directly to the possibility of state defendants. *See id.* at 451-56.

themselves liable under the Act—for example, commercial employers, *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 637 (1984), and non-profit institutions, *see Community Television of S. Calif.* v. *Gottfried*, 459 U.S. 498, 507 (1983). And unlike the EHA, the states are given no responsibilities for the implementation of the Rehabilitation Act. Thus, it was entirely possible that some members of Congress did not advert to state liability in enacting the Rehabilitation Act. The EHA, however, admits of no such possibility.[66]

The unanimous ruling in *Fitzpatrick* clearly shows that when a statute is enacted under the Fourteenth Amendment and reveals a manifest intent to subject the states to suit, that statute will be held to abrogate state immunity. *See* 427 U.S. at 451-56. Endorsement of petitioner's position would not be using a rule of construction to elucidate Congress' intent; rather, it would be actively cutting back upon a congressional program.

* * * *

---

[66] And the EHA *certainly* left no such doubts in 1975, at which time the Court applied what petitioner agrees was a "less stringent standard," Petition for Cert. at 35 n.6, in determining whether a statute abrogated state immunity. The case for abrogation is even clearer if the EHA is interpreted against the backdrop of the case law as it existed in 1975 when Congress passed the statute. It would ill-serve the Court's task of ascertaining Congress' intent in enacting the EHA rigidly to apply the *Atascadero* rule of construction to a statute written ten years before that rule was announced. *See Welch* v. *State Dep't of Highways and Pub. Transp.*, 107 S. Ct. 2941, 2958 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("Even if we were now to find [a congressional assumption about Eleventh Amendment law] to have been wrong, we could not, in reason, interpret the statutes as though the assumption never existed."). *Cf. Procunier* v. *Navarette*, 434 U.S. 555, 562 (1978) (noting that officials "cannot be expected to predict the future course of constitutional law").

In short, there is nothing in the Eleventh Amendment or in any of this Court's decisions construing the amendment to prevent this complex, comprehensive, and impressively workable statute from being given its full and intended effect. *Burlington's* holding that reimbursement is both necessary to give the EHA its full effect and authorized by Congress therefore disposes of this case. Because Muth falls within the *Burlington* rule of reimbursement for reasonable tuition expenses made by a parent during a period when no appropriate education was available to his son, the Court need not reach the second issue on which certiorari was granted—whether the procedures Pennsylvania followed accord with the mandates of the EHA.

IV. AS AN ALTERNATE AND INDEPENDENT MATTER, MUTH SHOULD BE REIMBURSED FOR THE TUITION HE PAID DURING THE LENGTHY DELAY IN THE ADMINISTRATIVE PROCESS THAT WAS CAUSED BY PETITIONER'S VIOLATIONS OF EHA PROCEDURES.

A. This Court Need Not Reach The Partiality Issue Because Other Procedural Violations Which Have Been Established Below Are A Sufficient Basis For the Reimbursement That Was Ordered.

The court below held that the procedures followed in this case violated the EHA in a way that was harmful to Muth, *both* because the EHA disqualifies the Secretary as decisionmaker *and* because his decision was not "final" within the EHA requirement.[67] Petitioner sought certiorari only on the second

---

[67] The district court held in addition that the procedure violated the EHA by allowing the decision of the original state hearing officer to be further reviewed within the administrative process, *see Muth* v. *Smith*, 646 F. Supp. 280, 283, 284 (E.D. Pa. 1986), a question the court of appeals did not reach because even without it the procedures used were illegal and harmful to Muth. *See Muth* v. *Bucks County*, 839 F.2d 113, 126 (3d Cir. 1988).

Pennsylvania's procedures allow the Secretary (or his designee) to conduct initial hearings, 22 Pa. Code §§ 13.32(2), 13.32(12), and also

ground, but the first is sufficient to dispose of the case.[68]

One important purpose of the EHA's procedural protections, which are at the heart of the Act,[69] is to prevent delay and allow a swift determination of the appropriate educational placement[70]—preventing the child from being held in limbo for long

---

allow review by the Secretary, 22 Pa. Code § 13.32(24). On its face, this process violates the Act because a review is permissible only when the hearing is conducted on a local level. *See* 20 U.S.C. § 1415 (c); S.Conf.Rep. No. 455, 94th Cong., 1st Sess., at 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1480, 1502. In this case, the Secretary used the illegal review to order the illegal remand and impermissibly to delay the administrative process.

[68] The remand violated the EHA because it: (1) did not provide Muth with a "final" judgment as required by 20 U.S.C. § 1415(e)(1) and 34 C.F.R. § 300.512(b)(1); (2) exceeded the stringent time requirements of 34 C.F.R. § 300.512; and (3) obstructed access to judicial review as provided for in 20 U.S.C. § 1415(e)(2) and 34 C.F.R. § 300.511.

[69] *See Rowley*, 458 U.S. at 205 ("When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid."); *see also Jackson* v. *Franklin County School Bd.*, 806 F.2d 623, 630 (5th Cir. 1986) ("The formality of the Act's procedures is itself a safeguard against arbitrary and erroneous decision-making.").

[70] *See, e.g.*, 121 Cong.Rec. 37416 (Nov. 19, 1975) (remarks of Sen. Williams):

> . . . I cannot emphasize enough that delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of required special education and related services can result in a substantial setback to the child's development. Thus, in view of the urgent need for prompt resolution of questions involving the education of handicapped children it is expected that all hearings and reviews conducted pursuant to these provisions will be commenced and disposed of as quickly as practicable consistent with fair consideration of the issues involved.

periods during which he should be receiving an appropriate education. The EHA procedures aim at allowing the parent who doubts the appropriateness of his child's placement to obtain a final administrative determination as quickly as possible so that he can accept it or, if necessary, seek judicial review. According to time requirements spelled out in contemporaneously promulgated EHA regulations, even an impartial and independent decisionmaker who *is* permitted to review the decision of an initial hearing officer must render his decision within 30 days of an appeal. 34 C.F.R. § 300.512(b). In this case, an appeal was first made by CB on November 14, 1983, so Muth should have had a final administrative decision by December 14, 1983, but because of the remand, Muth did not obtain his reviewable administrative order until October 24, 1984—almost 10 months later.[71]

The illegal remand in this case accounted for most of the delay. By remanding in violation of the Act, the Secretary initiated a second round of the administrative process that lasted an additional nine months. Accordingly the judgment below fully sustains Muth's award of reimbursement, as long as the state is a proper defendant, without this Court reaching the issue of impartiality on which certiorari was granted.

B. If This Court Addresses Impartiality, It Should Find That The Terms Of The EHA Remove The Act From The Administrative Law Paradigm And Disqualify The Secretary As a Reviewing Officer.

Impartiality and bias are difficult concepts to define and, in practice, unusually difficult to prove. Significantly,Congress

---

[71] The petitioner seems to have missed the point that the EHA gives the parent and child a right to a swift administrative decision. When Muth ultimately obtained a final administrative order—long after the statute required—CB objected vigorously that *even then* Muth had not exhausted his administrative remedies (RA I at 29, 46, 52-53). Moreover, in Pennsylvania even the Secretary's decision does not comply with the EHA's finality requirement; either party is permitted to ask the Secretary to reconsider, *See* 1 Pa. Code § 35.241; RA I at 69.

did not leave the question of who is an impartial decisionmaker up to traditional administrative law doctrine or evidentiary hearings. The EHA's unique provisions pointedly relieve plaintiffs of the burden of showing partiality. Petitioner's appeal to principles of general administrative law principles is thus inapposite.

Section 615 of the EHA, entitled "Procedural Safeguards," provides the right to an "impartial due process hearing" to resolve complaints. 20 U.S.C. § 1415(b)(2). The statute reads: "No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child." *Id.; see also* 34 C.F.R. § 300.507(a)(1). In circumstances where an appeal is permitted, the state "shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review." 20 U.S.C. § 1415(c).[72] Federal regulations further prescribe that no hearing may be conducted "[b]y a person having a personal or professional interest which would conflict with his or her objectivity in the hearing." 34 C.F.R. § 300.507(a)(2).

The Senate Conference Report explains the impartial due process requirement:

> (b) . . . *the conferees point out that any hearings are not conducted by the agency itself, but rather at the appropriate agency level. The hearing will be conducted by an impartial hearing officer since the State or local agency or intermediate unit will be a party of any complaint presented.*

---

[72] The regulations stipulate that hearing officers are not disqualified on the grounds that they are employees just because they are hired to perform this function. 34 C.F.R. § 300.507(b). The regulations also provide that state and local educational agencies may maintain a list of qualified and impartial hearing examiners. *Id.* at § 300.507(c). Both provisions create the unavoidable inference that it was anticipated that public agencies would look beyond their own members and to the outside for impartiality and independence.

> (c) no hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings *and individuals conducting a review of the local due process hearing*; . . .[73]

S.Conf.Rep. No. 455, 94th Cong., 1st Sess., 49, *reprinted in* 1975 U.S.Cong.Code & Admin. News 1480, 1502 (emphasis added).

The review in this case violated the statutory scheme for four principal reasons. First, the review was conducted by "the agency itself." The State Secretary of Education, as the Department of Education's chief executive officer and policymaker, is the human embodiment of the agency itself. This is a critical distinction between the EHA and the classic administrative model, where decisionmaking by an agency head is accepted practice. The authorizing statutes of other agencies do not *bar* decisionmaking by the "agency itself," but rather *require* decisionmaking at that level. Pennsylvania has no procedures to insulate the *independence* of the Secretary's decisionmaking from the process by which the agency itself makes decisions, and even the Commonwealth refers to the Secretary and the agency interchangeably.[74]

One reason the EHA prohibits review by "the agency itself" is that the agency may be a party to the proceedings, either as a

---

[73] This language supports the view of most courts that the same impartiality requirements for hearing officers apply equally to review officials. *See, e.g., Colin K. by John K.* v. *Schmidt*, 715 F.2d 1, 5 (1st Cir. 1983). Petitioners concede this point. Br. of Pet. at 62 & n.17.

[74] *See* 22 Pa. Code § 1.1 (the Department of Education and Secretary of Education are one and the same). *Compare* 22 Pa. Code § 13.32(24) ("The decision of a hearing officer may be appealed to the Secretary") *with* Draft FY 1988-89 Pennsylvania State Plan (1988) ("The decision of a hearing officer may be appealed to the [state education agency])." Both secretaries who reviewed hearing officer opinions in this case spoke not for themselves but as "we."

plaintiff joining the parent against the school district, or as a defendant, alone or with a local agency. As an "aggrieved party" it also may appeal from state hearing officer or reviewing officer decisions. *See* 20 U.S.C. § 1415(e)(2). This provision would make no sense were the Secretary to serve as review officer. Petitioner's appeal to the administrative law paradigm ignores the critical fact that while many agencies have multiple roles—as policymaker, party and adjudicator—they generally have no right to appeal their own decisions.

Moreover, the Secretary was a partial decisionmaker under the EHA because he is an "employee" of the state educational agency (even if state constitutional officers are not considered "employees" in some wholly inapplicable legal contexts) and also because he was "involved in the education or care of the child" within the meaning of the statute. Most courts, like those below, have found that supervisory officials involved in special education are not impartial under the EHA,[75] and few states besides Pennsylvania employ such a procedure. *See Amicus* Brief of ACLU *et. al.* at 19 & Exhibit A.

Third, petitioner's request that this Court allow it to use state secretary review to declare policy positions,[76] *see* Br. of

---

[75] While one Senate Report stated that a hearing may not be conducted by state or local educational agency employees "*directly*" involved in the education of the child, the subsequent Conference Report deleted the word "directly." *Compare* S.Rep. 94-168 at 47, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1470, *with* S.Conf.Rep. 94-455 at 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1502. *Accord Robert M.* v. *Benton*, 634 F.2d 1139, 1142 (8th Cir. 1980) ("The Senate Conference Report therefore indicates that the Act, promulgated as the conference substitute for differing House and Senate versions of the bill . . . intentionally expanded its prohibition to include employees of state educational agencies not directly involved in the education of the child and so to disqualify them from serving as hearing officers under Section 1415(b)(2).").

[76] Such a regime would hold the potential routinely to circumvent Congress' interest in exhaustion of administrative remedies, since

Pet. at 65, 77-78, directly conflicts with the *modus operandi* of the Act—an *individualized* education plan—and the statutory requirement that the hearing officer's decision *independently* decide each case on its individual merits. As best it could, Congress sought to ensure attention to the inherently individual and unique nature of each child's abilities by making every effort not to permit decisionmaking by those with vested policy interests or fiscal concerns. State agencies are not of course powerless to formulate and enforce their policies; they have many other ways to achieve these goals, *see, e.g.*, 20 U.S.C. §§ 1412; 1413; 1414(b), including judicial review.

The U.S. Department of Education has concluded that in view of congressional intent, there is a very strong presumption that chief state school officers are precluded from serving as state level review officials. Department of Education, Office of Special Education *Revised DAS Bulletin No. 107* (January 16, 1984) *reprinted in* Educ. Hand. L. Rep. 203:19 (May 8, 1987). In the absence of a "clear and convincing rebuttal," the Department has stated "this presumption operates as a categorical prohibition." *Id.* In contrast to petitioner's support for review as a means of policymaking, the Department specifically warned that no review should be conducted by any state official who has been "in any way substantially involved in the development of any state or local policy or procedure which is directly or indirectly being challenged . . . ." *Id.* at 203:20. This Departmental interpretation accords with the statutory language, but even if the statutory language were ambiguous, as petitioner contends, deference would be due to the agency's views. *See Chevron U.S.A.* v. *NRDC*, 467 U.S. 837, 842-43

---

such challenges would obviously be futile and thus exempt from the exhaustion requirement. *See, e.g., Burr* v. *Ambach*, No. 88-7275, slip op. at 14-15 (2d Cir. Dec. 12, 1989) (exhaustion before state commissioner of education would be futile and was not required when he was not impartial because of his extensive responsibilities and integral involvement in handicapped education).

(1984); *NLRB* v. *United Food Workers Union*, 108 S. Ct. 413, 426 (1987) (Scalia, J., concurring).

Finally, Secretary level review contravenes the Act since he and his department are potential parties to any complaint. Petitioner concedes that the Secretary would be partial when the state is a party, but suggests this will be a rare event. The admission is important because the Secretary's authority to conduct reviews is in no way limited to cases in which the state is not a party and because petitioner's assertion about the likelihood of the state being a party is plainly wrong. *See supra* pp. 36-38; *Amicus* Brief of ACLU *et al.* at 8-10.[77]

C. Violation Of The EHA's Impartiality Requirement Was Harmful To Muth, And Tuition Reimbursement Is An Appropriate Remedy.

The procedural violations caused harm to Muth. Like the other procedural violations, the absence of impartial review is

---

[77] Petitioner argues in addition that despite explicit statutory language to the contrary, Congress did not intend to look beyond the exact state appeal and review procedures adopted by the district court in *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 343 F. Supp. 279, 303 (E.D. Pa. 1972). This Court has already recognized that Congress adopted some provisions of *PARC* (as well as another influential case, *Mills* v. *Board of Education of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972)), while rejecting others. *Honig* v. *Doe*, 108 S. Ct. 592, 605 (1987) (given Congress' close attention to *PARC*, any omission from the *PARC* procedure must have been intentional; "we are therefore not at liberty to engraft onto a statute an exception Congress chose not to create."). Although the EHA was influenced by *PARC* and *Mills*, Pennsylvania was only one of the twenty-two States and more than 100 witnesses that proffered testimony at numerous congressional hearings held across the country. S.Rep. No. 168, 94th Cong., 1st Sess., 7, *reprinted in* 1975 U.S. Code Cong. & Admin. News, 1425, 1431. The Act reflected a compromise between specific House and Senate versions and the result did not reflect the ideas of any single person, state, or judicial opinion. *See, e.g.*, 121 Cong. Rec. 19502 (June 18, 1975) (remarks of Sen. Cranston).

closely linked with the serious delays that took place. A truly impartial decisionmaker would probably not have remanded. By remanding, the Secretary saved the state and local governments from having to appear in court in a bad posture, having developed no adequate proposal to provide Alex with education. The Commonwealth's process effectively prevented judicial review of any proposal for Alex's education that was actually available for use during the 1983-1984 school year. An impartial and independent reviewing officer might well have placed more value on Muth's right to a speedy and final administrative decision.

Moreover, even apart from delay, parents have an important stake in whether the decisionmaker is independent and impartial. Because it could not specify *ex ante* the type of education appropriate to individual cases, Congress relied on procedural protections to produce the result appropriate to each case,[78] granting broad powers to decisionmakers under the Act to fashion appropriate remedies. Even where the standard for appropriate education is defined, the standard is imprecise.[79] The substance of the standard depends on the facts of the particular case. Interpretation and application of the standard relies heavily upon the judgment and discretion of the hearing officer and, where applicable, the reviewing official.

A neutral decisionmaker is important to the process because parents and government (state and local educational agencies) bring very different perspectives to the special education process. From the perspective of the parent who because of the

---

[78] *See, e.g., McKenzie* v. *Smith*, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The substance of the EAHCA is in essence embodied in the procedural mechanisms it mandates.").

[79] Even where *Rowley's* "any benefit" standard applies, for example, it would not be satisfied by hiring a "teacher with a loud voice." *Rowley*, 458 U.S. at 215 (White, J., dissenting). Similarly, states that apply a maximum benefit standard do not apply it literally. *See Geis* v. *Board of Educ.*, 774 F.2d 575, 582-83 (3d Cir. 1985).

EHA does not have to pay for his handicapped child's education, there is no amount of money that is too great to spend to help his child learn what he can. State and local governments, on the other hand, must manage a budget and have financial incentives to provide the least expensive placement (usually in the public school system) and to provide a minimum of services. The EHA says nothing about such central questions as the amount of money to which a child will be entitled to pursue his education.

The scheme of the Act is that through negotiation these two opposing viewpoints will work out an appropriate resolution. If the negotiation does not yield a solution, however, the hearing officer, and in some cases a reviewing official, must make a neutral decision between the two perspectives, or work out some fair middle alternative, in order to give substance to the central protection of the statute. In many instances, these decisions have significant financial ramifications for the state and/or local government. Pennsylvania, for example, has established a system in which the state pays 80 percent of tuition at a private school for "certain exceptional children" and the locality pays 20 percent. Stat. Ann.tit. 24, Pa. § 13.1376(a) (1988). Even if the Secretary were not an "employee" under the EHA, the fiscal implications of his decision on his agency render him an interested party under the regulations. 34 C.F.R. § 300.507(a)(2). *See Mayson* v. *Teague*, 749 F.2d 652 (11th Cir. 1984).

If the hearing officer is one of the parties—or even if he is closely fiscally linked with one of the parties, as a chief state school officer may be with the local school districts—there will be no neutrality and the parent will have the controversy decided by the state itself.

The harm Muth suffered is properly compensable by tuition reimbursement. In *Rowley*, this Court held that because the EHA's procedural safeguards are essential to assuring the rights of handicapped children and their parents, the Act's remedies are available for procedural violations. *See* 458 U.S.

at 205-206. Courts have given reimbursement for procedural violations that have caused expense to the parent, as the procedural violations did here.[80]

The issue in this case is reimbursement for a period in which the parent could not know what the outcome of the administrative proceeding would be or when it would end. After years of trying to educate Alex within the public school system, Muth reasonably placed his child in a private special needs school that was in fact extremely beneficial to Alexander during the period that the school district was not offering an appropriate education, or at least a period when he reasonably believed it was not.

Whether one examines the procedural violations as a group (for they are intertwined), or adverts alone to the partiality of the reviewing official, those illegalities caused the delay for which Muth was reimbursed and they may also have changed the result on the merits from an outcome for Landmark rather than the public school. It is appropriate to award reimbursement when egregious procedural violations have caused a parent actual harm, as they have in this case.

---

[80] *See, e.g., Hall by Hall* v. *Vance County Bd. of Educ.*, 774 F.2d 629 (4th Cir. 1985) (awarding tuition reimbursement because failures to comply with EHA procedural safeguards are "adequate grounds by themselves" for holding that the right to a free appropriate education has been denied).

CONCLUSION

For the foregoing reasons, the court of appeals' award of tuition reimbursement should be affirmed.

Respectfully submitted,

MARTHA A. FIELD
Harvard Law School
Cambridge, Massachusetts 02138
(617) 495-2962

Counsel for Respondent Muth

APPENDIX A

Law Offices
EASTBURN AND GRAY

60 East Court Street
Doylestown, PA 18901
Area Code (215) 345-7000

November 28, 1983

Russell A. Muth, Jr.
66 Springs Drive
Doylestown, PA 18901

Re: R. Alexander Muth

Dear Mr. Muth:

Your letter of November 20, 1983, to Dr. Newman has been forwarded to us for a reply. Because of the exceptions that have been filed with the Department of Education by both the District and you, all proceedings are stayed in the above captioned matter. The District is under no obligation to implement any of the recommendations of the hearing officer until such time as the exceptions have been ruled upon.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

EASTBURN AND GRAY

By: Joanne D. Sommer

JDS/cmc

cc: Dr. Newman
Dr. Laws

APPENDIX B

IN RE: ROBERT ALEXANDER MUTH

EXCEPTIONS OF CENTRAL BUCKS SCHOOL DISTRICT TO THE DECISION OF THE HEARING OFFICER

1. If the decision of the Hearing Officer is intended to be a finding that the Central Bucks School District has shown by a preponderance of the evidence that it can provide an appropriate and adequate education for R. Alexander Muth and that placement outside the district is not justified by the evidence presented by the parent, then upon clarification of the recommendations of the Hearing Officer, the exceptions of the Central Bucks School may be withdrawn.

2. The findings of facts, conclusions of law and recommendations of the Hearing Officer do not resolve the general issues sought to be addressed by the parties.

3. The transcript of the due process hearing is incomplete as it does not contain the exhibits introduced by the parties.

4. The summary of the evidence presented by the school district is inaccurate and incomplete as it fails to incorporate the testimony of school district witnesses with the exhibits presented by the school district.

5. The Hearing Officer improperly admitted the report of Dr. Adamson over objection by the school district and ascribed undue weight to its uncorroborated conclusions.

6. The Hearing Officer improperly interpreted the report of Dr. Adamson and improperly adopted the unsupported conclusions of Dr. Adamson.

7. The Findings of Fact of the Hearing Officer are unsupported by the record of the hearing.

8. The Finding of Fact that the student exhibited an inability to work one-on-one with an aide is not supported by the Notes of Testimony and was taken out of the context of the testimony of the principal, David Spencer.

9. The Finding of Fact that SD-14 describes a significant lag in scholastic achievement is an inaccurate interpretation of SD-14 in view of the testing results presented by the school district showing progress equivalent to one year's work for each year the student attended the program offered by the school district.

10. The Hearing Officer improperly relied on out-of-context statements of witnesses and portions of exhibits to support his findings of fact and conclusions of law.

11. The Hearing Officer improperly accepted the recommendations of Dr. Adamson for private school placement of the student. Said recommendation was not the result of review of the school district program, interview of school district teachers, psychologist or professional staff or observation of the student in the educational setting.

12. The Hearing Officer's findings of fact are incomplete and inaccurate in that they:

(a) fail to take into account the proposal offered by the school district in June of 1983 recommending a more restrictive learning environment for the student;

(b) fail to recognize that the parent refused to allow the district to have an independent psychiatric evaluation performed;

(c) fail to recognize the yearly increase in achievement of the student as reflected by the testing scores;

(d) fail to conclude that the student's emotional difficulties have been caused by the parent-child relationship.

13. The Finding of Fact that the auditory language processing examination was secured due to "parental insistence" is totally unsupported by the record.

14. The Finding of Fact that the evaluation by the Diagnostic Learning Consultant indicated highly significant academic under achievement is unsupported by the testimony (N.T. 52, 47-49).

15. The Hearing Officer's analysis of the test scores was erroneous in that he failed to take into account the testimony regarding the progress made by the student since his matriculation at the school district (N.T. 52).

16. The Hearing Officer's findings of fact that the I.E.P. (SD-2) does not describe an appropriate program for the student's learning disabilities is not supported by the evidence.

17. The Finding of Fact that instructional strategies and classroom activities do not address the student's auditory perceptual dysfunction is against the weight of the evidence (N.T. 107, 109).

18. The Finding of Fact that "behavioral success and adjustment was not evident in either the self-contained room nor resource room" is against the weight of the evidence.

19. The Finding of Fact that there is evidence to indicate minimal brain dysfunction is against the weight of the evidence.

20. The Conclusion of Law that the program advocated by the school district is inappropriate relative to effectiveness and efficiency is against the weight of the evidence.

21. The recommendations of the Hearing Officer are not specific and are subject to different interpretations by the parties.

22. The recommendations of the Hearing Officer are not substantiated by the evidence.

23. The Hearing Officer's decision must be reversed because the school district showed, by a ponderance [sic] of the evidence, that its proposal was both appropriate and adequate.

24. The Hearing Officer failed to explain why the preponderance of the evidence requirements had not been met by the school district.

25. The Hearing Officer's Recommendation "A" is against the weight of the evidence and not warranted by the testimony presented in that:

(a) Only one parent of the student is residing in the Commonwealth of Pennsylvania and the student's mother resides in Texas;

(b) The school district's testimony indicated that its personnel had already met with Mr. Muth in June, 1983, and proposed a more restrictive educational setting for the 1983-1984 school year. (N.T. 112-113) Mr. Muth refused to allow the school district to develop a new I.E.P. to reflect this programming (N.T. 129, 130, S.D. 15, S.D. 16, N.T. 140);

(c) The student has not attended school within the Central Bucks School District since on or about September, 1983, but is attending a private school in Massachusetts. (N.T. 140);

(d) The student made appropriate gains in reading (N.T. 52);

(e) There is no evidence in the record to support the conclusion that socio-emotional difficulties were exacerbated by the educational placement. The evidence clearly indicated that the student's secondary emotionality was caused by the home environment and relationship with the parent.

(f) The conclusion that programmatic changes have not alleviated the emotional distress or facilitated the acquisition of necessary academic social and vocational skills is against the weight of the evidence.

26. The school district evidence revealed by a ponderance [sic] of the evidence that Recommendation "B" had been addressed by district professionals. (N.T. 107, 109)

27. Recommendation "C" is outside the scope of the Hearing Officer's discretion and power under the Pennsylvania School Code in that:

(a) The student has not been classified as socially-emotionally disturbed;

(b) A program of behavior modification is not warranted by the evidence and not required as a related support service under the Pennsylvania School Code.

(c) Referral of parents for family therapy is inappropriate as only one parent resides within the Commonwealth of Pennsylvania and the custodial parent has already been requested to undergo counselling but has refused.

28. Recommendation "E" is against the weight of the evidence presented by the school district and parent.

29. The Hearing Officer erred in failing to find that the school district had met its burden of proof by a preponderance of the evidence.

30. The Hearing Officer erred in failing to give sufficient weight to the testimony of the school district regarding the 1983-1984 proposal for placement of the student.

Respectfully submitted,

EASTBURN AND GRAY

By: Joanne D. Sommer

APPENDIX C

David R. Drake
Headmaster

Prides Crossing
Massachusetts 01965-0417
(508) 927-4440

LANDMARK SCHOOL

January 17, 1989

Professor Martha A. Field
Harvard Law School
Cambridge, MA 02138

Dear Professor Field:

In response to your request, Landmark began school on September 14, 1983 and ended June 16, 1984.

I hope this information is helpful to you and that you will call us if we can be of any further assistance.

Sincerely,

MERYL S. DOHERTY
Director of Admission

Supreme Court, U.S.
FILED
FEB 14 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO 87-1855

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

THOMAS K. GILHOOL,

Petitioner

v.

RUSSELL A. MUTH, JR., et al.,

Respondent

On Writ of Certiorari
To The United States Court of Appeals
For the Third Circuit

REPLY BRIEF FOR PETITIONER

ERNEST D. PREATE, JR.
Attorney General

MARIA PARISI VICKERS
Senior Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Attorneys for Petitioner

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

TABLE OF CONTENTS

PAGE(s)

TABLE OF AUTHORITIES..... iii

ARGUMENT..... 1

I. HANS V. LOUISIANA WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED..... 3

A. Hans Was Correctly Decided..... 6

B. Hans, Far From Having Produced an "extremely awkward and occasionally absurd theoretical framework" embodies a vital principle of federalism. 13

II. WHEN CONGRESS ENACTED THE REHABILITATION ACT AMENDMENTS OF 1986 IT DID NOT INTEND TO SUBJECT STATES TO SUITS PURSUANT TO THE EHA..... 21

III. THE COURT IN BURLINGTON NEITHER CONSIDERED NOR NEEDED TO CONSIDER THE BAR OF THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES WHEN IT AWARDED TUITION REIMBURSEMENT AGAINST A SCHOOL DISTRICT..... 26

TABLE OF CONTENTS
(Continued)

PAGE(s)

IV. THE EHA DOES NOT EXPRESS CONGRESSIONAL INTENT TO DEPART FROM TRADITIONAL CONCEPTS OF IMPARTIALITY IN EDUCATIONAL DUE PROCESS HEARINGS..... 35

CONCLUSION..... 41

TABLE OF AUTHORITIES

CASES	PAGE(s)
Atascardero State Hospital v. Scanlon, 473 U.S. 234 (1985).....	4, 5 21
Burlington School Committee of The Town of Burlington v. Department of Education, 471 U.S. 359 (1985).....	2, 26, 27, 28, 29
Chisholm v. Georgia, 2 Dall. 419 (1793).....	11, 13
Edelman v. Jordan, 415 U.S. 651 (1974).....	7, 16
Ex parte New York, No. 1, 256 U.S. 490, 497 (1921).....	4
Ex parte Young, 209 U.S. 123 (1908).....	16
Goldberg v. Kelly, 397 U.S. 254 (1970).....	37
Hans v. Louisiana, 134 U.S. 1 (1890).....	passim
Harlow v. Fitzgerald, 457 U.S. 800 (1982).....	31
Hensley v. Eckerhart, 461 U.S. 424 (1983).....	35

TABLE OF AUTHORITIES

CASES	PAGE(s)
Hustler Magazine v. Falwell, No. 86-1278 (February 24, 1988)	31
Imbler v. Pachtman, 424 U.S. 409 (1976)	31
Nixon v. Fitzgerald, 457 U.S. 731 (1982)	31
Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984)	5, 17
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	23, 39
Stump v. Sparkman, 435 U.S. 349 (1978)	30
Teamsters v. Daniel, 439 U.S. 551 (1979)	39
United States v. McLemore, 4 How. 286 (1846)	8, 31
Welch v. Dept. of Highways and Public Transportation, No. 85-1716 (June 25, 1987)	passim
Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982)	2, 33

PAGE(s)

UNITED STATES CONSTITUTION

Art. I, §§ 8, cl. 3..... 7, 8

Art. III, § 2, cl. 3..... 7, 8

Amend. XI..... passim

FEDERAL STATUTES

Education for All Handicapped Children Act of 1975, P. L. No. 74-172
20 U.S.C. §§ 1400-1461..... passim

20 U.S.C. §1415..... 32

20 U.S.C. § 1415(a)(3)..... 28

20 U.S.C. § 1415(e)(2)..... 27

20 U.S.C. § 1416..... 33

Handicapped Children's Protection Act, Pub. L. 99-372, 100 Stat. 796 (1986) codified at
20 U.S.C. § 1415(e)(4)(G)..... 25

Rehabilitation Act Amendments of 1986, Pub.L. 99-506, 100 Stat. 1807 (1986)
42 U.S.C. §2000d-7..... passim

PAGE(s)

MISCELLANEOUS

3 J. Elliott, The Debates in the Several State Conventions on the Adoption of The Federal Constitution (2d ed. 1861)..... 9

The Federalist (B. Wright ed. 1961).
No. 22..... 12
No. 80..... 12
No. 81..... 10

4 Annals of Cong. 30 (1794)..... 11

0. Holmes, The Common Law (1881)..... 14

ARGUMENT

In our main brief we outlined the authority and policies which support the conclusion that in enacting the EHA[1] Congress did not abrogate the Eleventh Amendment immunity of the States and that the Secretary of Education is an impartial reviewing officer.

In response, Muth argues: (1) that Eleventh Amendment jurisprudence should be overhauled by overruling Hans v. Louisiana, 134 U.S. 1 (1890), Br. for Resp. Muth p. 17; (2) that, in any case, Congress has abrogated the States' Eleventh Amendment immunity when it

---

[1]Education for all Handicapped Children Act of 1975; Pub.L. No. 74-172, 20 U.S.C § 1400-1461.

enacted the EHA and the Rehabilitation Act Amendments of 1986,[2] Br. for Resp. Muth, p. 35, 37; (3) that the holding in Burlington School Committee of the Town of Burlington v. Department of Education, 471 U.S. 359 (1985) authorizes tuition reimbursement against the state, Br. for Resp. Muth p. 25; and (4) that the EHA imposes a higher standard of impartiality than other administrative law models and hence the Secretary of Education is precluded from reviewing education appeals, Br. for Resp. Muth p. 53.

Muth's view of Eleventh Amendment jurisprudence and the requisite standard of impartiality which the EHA demands in a reviewing officer misses the mark.

---

[2]Rehabilitation Act Amendments of 1986, Pub.L. No. 99-506, 100 Stat. 1807 (1986), 42 U.S.C. § 2000d-7.

I. HANS V. LOUISIANA WAS CORRECTLY DECIDED AND SHOULD NOT BE OVERRULED.

In Hans v. Louisiana, the Court held that an unconsenting State cannot be sued in the federal courts by one of its own citizens, even if the case arises under the Constitution and laws of the United States. The Court based its holding, not so much on the Eleventh Amendment as such, but on the Constitution as it stood even before the Eleventh Amendment was adopted: "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Id., at 15. As the Court has many times explained,

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against the State without consent given: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Ex parte New York, No. 1, 256 U.S. 490, 497 (1921)(citations omitted), quoted in Atascadero State Hospital v. Scanlon, 473 U.S. 234, 239, n.2. Hans, and the long line of cases that follow it, establish not just a principle of State sovereign immunity but a structural

principle of federalism that recognizes the vital role of the States in our federal system. "A state's constitutional interest in immunity encompasses not merely whether it may be sued, but where it may be sued." Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 99 (1984)(footnote omitted, emphases in original).

In the century since it was decided, "the fundamental principle enunciated in Hans has been among the most stable in our constitutional jurisprudence." Welch v. Dept. of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 17 (plurality opinion). See Atascadero State Hospital v. Scanlon, supra, at 243-44, n.3 (collecting cases). Nevertheless, Muth asks the Court

to re-examine for the sixth time in three years, Hans and its progeny. Br. for Resp. Muth, p. 17-24. "Once again, [they] have placed in issue the fundamental nature of our federal system." Welch, supra, slip op. at 10 (plurality opinion). Muth bases his argument on 1) the asserted incorrectness of Hans on the basis of the historical record and 2) the "extremely awkward and occasionally absurd theoretical framework" that Hans allegedly has produced. Br. for Resp. Muth, p. 19. He is wrong on both counts.

A. Hans Was Correctly Decided.

The historical and legal underpinnings of the decision in Hans have been exhaustively recounted on many occasions, and there is no need to repeat that material here. See, e.g.,

Welch, supra, slip op. at 11-16 (plurality opinion); Edelman v. Jordan, 415 U.S. 651, 600-662; Hans, supra, at 12-14. Petitioner here reviews only the main headings of that support:

1. The text of Article III of the Constitution is at least as supportive of Hans as not. Article III, Section 2 extends the federal judicial power to all cases arising under the federal Constitution, laws and treaties, and (before the Eleventh Amendment) to controversies "between a State and citizens of another State." The question is whether these grants were subject to the implied immunity of States from suits by individuals, so as to reach only those cases where a State was a plaintiff or waived its immunity.

The broad language of the clauses in question contains no such limitation; nevertheless, this is exactly

the construction given to the equally broad clauses of the same section that extend the judicial power to "controversies to which the United States shall be a party" and to "all cases affecting ambassadors, other public ministers and consuls." Despite this broad language, the Court has recognized the United States' immunity from suit at least since United States v. McLemore, 4 How. 286 (1846); and no one, to Pennsylvania's knowledge, has ever suggested seriously that Article III abrogated diplomatic immunity. Nothing in Article III precludes a similar construction for cases involving the States, and indeed it is difficult to see why these similar clauses should not receive similar constructions.

2. During the debates on the ratification of the Constitution, Madison, Marshall and Hamilton all espoused the construction just discussed. Madison:

> [Federal] jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court.

3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 533 (2d ed. 1861). Marshall:

> I hope that no gentleman will think that a state will be called at the bar of the federal court.... It is not rational to suppose that the sovereign power should be dragged before a court. The intent

> is, to enable states to recover claims of individuals residing in other states.

Id., at 555.

Hamilton:

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation. It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.

The Federalist No. 81, p. 511 (B. Wright ed. 1961)(emphasis in original). These assurances, given in response to fears that the new federal courts would saddle the debt-heavy States with treasury-breaking liabilities, may well have been essential to the Constitution's ratification. Welch, supra, slip op. at 13-14.

3. Only four years after ratification, the Court, in Chisholm v. Georgia, 2 Dall. 419 (1793), rejected the view advanced by Madison, Marshall and Hamilton, and held that a private citizen could indeed drag a State before the federal courts. "The reaction to Chisholm was swift and hostile.... Within two years of the Chisholm decision, the Eleventh Amendment was ratified...." Welch, supra, slip op. at 14-15.

4. The Eleventh Amendment passed through Congress with little debate or dissent, but one incident deserves comment. The Senate rejected an amendment, offered by Senator Gallatin, that would have excepted from the Eleventh Amendment's bar "cases arising under treaties made under the authority of the United States." 4 Annals of Cong. 30 (1794).

The rejection of Gallatin's amendment refutes the suggestion that the Eleventh Amendment does not bar suits that are based upon the existence of a federal question. The federal government's interest in cases that arise under treaties, having as they do the potential to embroil the nation in international disputes, is even greater than its interest in cases arising under the federal Constitution or statutes. See The Federalist, No. 22, p. 197-98; No. 80, 500-01 (B. Wright ed. 1961). It therefore would be bizarre to suppose that the federal courts are empowered to entertain cases that arise under statutes but not cases that arise under treaties. And it would be still more bizarre to suppose that the federal courts, barred from hearing federal-question actions brought against a State

by citizen of other States, may nevertheless hear them when brought by a State's own citizens.

The text of the Constitution, the contemporary understanding of it at the time of ratification, the reaction to Chisholm, and the circumstances surrounding the adoption of the Eleventh Amendment--all support, if they do not compel, the conclusion that Hans was correctly decided. Certainly, nothing in the historical record compels the conclusion that it was not. Muth has simply failed to carry the heavy burden imposed on him by stare decisis. See Welch, supra, slip op. at 9.

B. Hans, Far From Having Produced an "extremely awkward and occasionally absurd theoretical framework" embodies a vital principle of federalism.

Despite the inadequacy of the evidence that Hans was incorrectly decided, Muth insists that Hans nevertheless should be overruled because, as he sees it, there is a need to clarify and rationalize Eleventh Amendment jurisprudence and the law of the States' immunity. Br. of Resp. Muth, p. 19.

While advocating an overhaul of Eleventh Amendment jurisprudence, Muth paradoxically acknowledges that the results achieved by the Court when it has applied the traditional Eleventh Amendment analysis are correct. Nevertheless, Muth asks the Court to reject this century-old analysis in favor of an analysis grounded on the doctrine of comity which he views as a more intellectually elegant tool for

analysis of federal/state interests. Br. of Resp. Muth p. 19-24. The Court should refuse his request.

1. In the first place, Muth's charge of doctrinal incoherency is not only untrue but irrelevant. Muth and the academics who support his position have forgotten that "[t]he life of the law has not been logic: it has been experience." O. Holmes, The Common Law 1 (1881). There is perhaps no area of the law where Holmes' celebrated epigram is so apt.

The hallmark of the Court's Eleventh Amendment jurisprudence is not a finicky intellectual tidiness but the practical accommodation of the competing state and national interests that are inherent in our federal system. The long line of decisions that follow Hans have developed a stable and predictable body of doctrine that is responsive to

these competing interests. Thus, the federal courts may order state officials to conform their future conduct to the requirements of federal law--a power necessary to vindicate the "supreme authority of the United States," Ex parte Young, 209 U.S. 123, 160 (1908)--but may not grant relief that would expend itself against a State's treasury, Edelman v. Jordan, 415 U.S. 651 (1974) --a prohibition which is directly responsive to the fears expressed in the ratification debates and which, when fulfilled in Chisholm, led to the adoption of the Eleventh Amendment. On the other hand, and in contrast to a Young-type case, a request for an order that a state official conform his or her conduct to state law implicates no federal interest, and the Eleventh Amendment therefore bars such

an action. Pennhurst State School & Hospital v. Halderman, supra, at 104-106.[3]

---

[3]Other aspects of the Eleventh Amendment doctrine, and the ways in which they respond to the needs of our federal system, were summarized by Justice Powell in the plurality opinion in Welch, supra:

> The contours of state sovereign immunity are determined by the structure of requirements of the federal system.... First, the United States may sue a State, because that is "inherent in the Constitutional plan." Absent such a provision, "the permanence of the Union might be endangered.'" Second, States may sue other States, because a federal forum for suits between States is "essential to the peace of the Union." Third, States may not be sued by foreign states, because "[c]ontroversies between a State and a foreign State may involve international questions in relation to which the United

(FOOTNOTE CONTINUED ON NEXT PAGE)

To the extent that this body of doctrine includes legal fictions or anomalies --and that extent is much less than Muth would have the Court believe-- they are anomalies that are inherent in our federal system of dual sovereignty, which is itself an anomaly if one chooses to look at it that way.

(FOOTNOTE CONTINUED)

> States has a sovereign prerogative." Fourth, the Eleventh Amendment established "an absolute bar" to suits by citizens of other States or foreign States. Finally, "[p]rotected by the same fundamental principle [of sovereign immunity], the States, in the absence of consent, are immune from suits brought against them by their own citizens...."

Welch, supra, slip op. at 17-18 (citations omitted).

Its virtue is not its academic rigor, but its practical success in preserving for two centuries the liberties of a free people by diffusing the power of government.

In the second place, Muth's proposal asks the Court simply to read the Eleventh Amendment out of the Constitution, presumably on the ground that it is "awkward" and "absurb" and that his proposed comity analysis is better. Not suprisingly, he offers no textual warrant for this remarkable extension of judicial authority.

In the third place Muth's proposed comity analysis is a wholly inadequate substitute for the Eleventh Amendment and related doctrines. Comity is simply a courtesy extended by one sovereign to another; it is, at bottom, a matter of self-restraint on the part of the federal courts. There can be no

doubt that the States who ratified the Constitution and the Eleventh Amendment would have resisted relinquishment of their sovereign prerogatives in exchange for the discretionary courtesy which is the hallmark of the doctrine of comity.

The constitutional framework before and after the adoption of the Eleventh Amendment clearly grants States more than mere courtesy; it grants them the sovereign prerogative of immunity from suit.

II. WHEN CONGRESS ENACTED THE REHABILITATION ACT AMENDMENTS OF 1986 IT DID NOT INTEND TO SUBJECT STATES TO SUITS PURSUANT TO THE EHA.

1. As discussed in our opening brief, nothing in the language of the EHA or its amendments approaches the "unmistakably clear" expression of Congressional intent necessary to abrogate the States' Eleventh Amendment immunity. Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Br. for Pet. p. 27-49. That argument need not be reiterated. Instead, we will address the theory, raised here for the first time and unaddressed by the lower courts, that the abrogation of immunity language in the Rehabilitation Act Amendments of 1986 applies to actions

brought pursuant to the EHA.[4] Br. for Resp. p. 35.

---

[4] The Rehabilitation Act Amendments of 1986 provide in relevant part:

§ 2000d-7. Civil rights remedies equalization (a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975 [42 U.S.C.A. § 1601 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

* * *

(b) Effective date

The provisions of subsection (a) of this section shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

Muth and his amici reason that since the EHA is an anti-discrimination statute, it is embraced by the terms of the RHA amendments. This conclusion is flawed. First, the RHA amendments are not dispositive of Muth's claim because they became effective on October 21, 1986, long after Muth's cause of action arose. Muth attempts to deal with this fact by brushing it aside in a footnote, Br. for Resp. Muth, p. 37 n. 48, but it is fatal to Muth's argument.

Second, the EHA is much more than a mere anti-discrimination statute. It is an entitlement statute which imposes detailed, specific and affirmative obligations upon the States for the purpose of providing a free, appropriate education to handicapped children. By contrast, the RHA applies to a variety of federally funded activities and "neither the language,

purpose nor history of § 504 reveals an intent to impose an affirmative-action obligation on all recipients of federal funds." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Admittedly, the common goal of the EHA and the RHA is to promote equal access of benefits to the handicapped. However, the obligations imposed upon grantees of federal funds differ materially under each statutory framework. The procedural and substantive remedies available to handicapped students under the EHA are not available under the RHA. Therefore, it is not surprising that in 1986 Congress abrogated the States' immunity in the anti-discrimination statutes while preserving that immunity under the EHA.

Third, it is noteworthy that while the EHA was amended to allow for recovery of attorneys fees--[5] at the very same time that the RHA amendments were being enacted-- Congress did not mention abrogation of the States' immunity. The conclusion is inescapable that Congress decided to abrogate immunity in one instance but not in the other. This result makes sense. The reprehensible nature of the discrimination proscribed by the RHA requires more severe sanctions than are required under the EHA, where violations occur because of differences in educational judgment rather than because of willful disregard for the child's welfare.

---

[5]Handicapped Children's Protection Act, Pub.L. No. 99-372, 100 Stat. 796 (1986) 20 U.S.C. § 1415(e)(4)(G).

III. THE COURT IN BURLINGTON NEITHER CONSIDERED NOR NEEDED TO CONSIDER THE BAR OF THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES WHEN IT AWARDED TUITION REIMBURSEMENT AGAINST A SCHOOL DISTRICT.

In their submissions, Muth and his amici argue that the one-year tuition damage award which the lower courts have imposed on Pennsylvania's Secretary of Education and the School District is nothing more than tuition reimbursement --a remedy authorized by the EHA and compelled here by the same equitable considerations which prompted the holding in Burlington School Committee of the Town of Burlington vs. Department of Education, 471 U.S. 359 (1985). Their reading of Burlington misconstrues the decision in crucial respects.

1. In Burlington, the Court held that the EHA grants a reviewing court the authority to reimburse parents for expenditures on private special educational placement if the court ultimately determines that such placement, rather than the IEP proposed by public school authorities, is proper under the Act.[6] Burlington, 471 U.S. 359 at 369. Implicit in the Court's holding are the findings (1) that the

---

[6]20 U.S.C. § 1415(e)(2) provides in relevant part that:

> [T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

parents' unilateral choice in educational placement was appropriate and (2) that the school district's IEP was not an appropriate placement. These findings distinguish Burlington from this case where the factual record is quite the reverse. Here, neither of the lower courts found that Alex's private school placement at Landmark was appropriate, and both lower courts found that the school district's 1983-84 IEP, if implemented, would have provided Alex an appropriate education.[7] Pet. App. 21a-28a; 145a-155a.

---

[7]See Br. of Resp. Central Bucks School District, pgs. 23-28 for facts supporting the conclusion that but for Muth's June 1983 invocation of the stay-put provision of 20 U.S.C. § 1415(a)(3), the school district's IEP conference proposals would have been formalized into an IEP for the 1983-84 school year. The fact that a hearing examiner did not vindicate the School District's judgment until 1984 is not relevant; an appropriate educational placement was available to Alex at all times in the Central Bucks School District.

2. Another critical distinction makes Burlington inapplicable here. In Burlington the Court did not need to, and did not consider, the effect of the States' Eleventh Amendment immunity because reimbursement relief was being sought only against the school district, an entity which is not protected by constitutional immunity.[8] Despite this crucial Eleventh Amendment burden, Muth argues strenuously that that the rationale in Burlington is controlling. He stresses that the purpose of the EHA cannot be achieved unless the courts can impose a reimburse-

---

[8]In reaching the holding that reimbursement was an appropriate remedy, the Court in Burlington relied on legislative history which focused on the local educational agency and the parents as participants in the due process hearing where financial responsibility was an issue. Id. 471 U.S. at 372.

ment remedy against the State in those situations where it is the State, and not the school district, which is directly involved in creating a child's IEP or approving private school placement.[9] (Br. for Resp. Muth 40-41) The answer obviously is that unless the Court first finds abrogation

---

[9]The number of handicapped children who allegedly will be denied a reimbursement remedy because they are educated in state schools is speculative, exaggerated, and not helpful to the Court in deciding this case which does not deal with reimbursement but rather, with damages awarded for procedural violations. Moreover, there is nothing in the record to establish the number of children who actually do attend state schools and who, in turn, seek private school placement which is, in turn, found to be appropriate while the state school's IEP is found to be inappropriate. Such a line of conjecture is obviously beyond the scope of this record.

of the States' immunity in the language of the EHA, the power of a federal court in granting "such relief as it determines appropriate" is necessarily limited by the constitutional barrier of the Eleventh Amendment.[10]

---

[10]Muth's insistence that there must be a reimbursement remedy against the State rests ultimately on the proposition that allowing injured persons to sue for compensation is not merely a good thing, but is an overriding value of such transcendent importance that it deserves to override constitutional doctrine. Only a moment's thought is necessary to dispel this fallacy. There are any number of areas where competing social values outweigh the need for compensation, producing immunities of one kind or another. E.g., United States v. McLemore, supra (sovereign immunity); Imbler v. Pachtman, 424 U.S. 409 (1976)(prosecutorial immunity); Stump v. Sparkman, 435 U.S. 349 (1978)(judicial immunity); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (presidential immunity); Harlow v. Fitzgerald, 457 U.S. 800 (1982)(executive branch immunity); Hustler Magazine v. Falwell, No. 86-1278 (February 24, 1988)(First Amendment immunity).

3. Moreover, while reimbursement is an appropriate remedy in a situation such as presented in Burlington, it is far from being the only remedy provided by the EHA. That statute imposes extensive procedural requirements which guarantee that parents will have input into the decisions regarding the education of a handicapped child. 20 U.S.C. § 1401 (19); See, Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 181-82 (1982). This procedural framework guarantees parents an opportunity to contest any decision made by the State regarding the child's identification, evaluation, or educational placement through administrative procedures and, if necessary, in court proceedings. 20 U.S.C. § 1415. As noted by this Court in Rowley, the EHA's emphasis on procedural

safeguards, evidences a Congressional intention that "adequate compliance with the procedures described would in most cases assure much if not all that Congress wished in the way of substantive content in an IEP." Rowley 458 U.S. at 206. In addition, the EHA provides that a State's failure to comply with its provisions may result in withholding of federal funds for the program. 20 U.S.C. § 1416. Certainly, the threat of such a penalty is the best possible incentive for the State to comply with the EHA and results in the most effective available remedy for handicapped children.

4. Finally, it is clear that the tuition award granted Muth is not reimbursement but is, in effect, a punitive damage award because the

Secretary of Education remanded and participated in the review process. However, there is no evidence in this record of actual bias on the part of the Secretary as reviewing officer or that in adapting a judicial tool to the administrative arena he knew that he was violating the EHA. Neither of the procedural defects deprived Muth of his right to participate fully in formulation of his child's IEP; nor did they deprive him of notice of his rights under the Act. Mr. Muth did not suffer any harm because of these procedural defects. Even if we were to consider this award without regard to the jurisdictional bar of the Eleventh Amendment, Mr. Muth does not deserve to recover damages against the Secretary.

IV. THE EHA DOES NOT EXPRESS CONGRESSIONAL INTENT TO DEPART FROM TRADITIONAL CONCEPTS OF IMPARTIALITY IN EDUCATIONAL DUE PROCESS HEARINGS.

Muth's argument on the issue of the Secretary's impartiality requires only brief commentary to supplement our submission in the main brief.[11]

---

[11]Muth suggests that the Court need not reach the issue of the Secretary's impartiality because a second procedural violation found by the courts below and unappealed by the Secretary (delay caused by the remand), independently supports the award of damages. Br. for Resp. Muth p. 50. Muth misunderstands the issues here. In the Court of Appeals, petitioner also challenged the district court's award of attorneys fees on the grounds that the district court had not followed the standand established by the Court in Hensley v. Eckerhart, 461 U.S. 424 (1983). The Court of Appeals agreed and remanded with instructions that Muth's attorney's fee recovery be limited to issues upon which he had prevailed. [Pet. App. pgs. 78a-82a] It is therefore relevant, for purposes of determing Muth's attorney's fee award, for the Court to address the issue of the Secretary's impartiality.

1. Muth's suggestion that traditional concepts of impartiality, which serve administrative bodies affecting vital areas of every citizen's life, are not applicable in the education context is unsupported both by the statute and by common sense. There is no indication in the language, purpose, or legislative history of the EHA that Congress believed that educational decision-makers are peculiarly predisposed to biased behavior. Congress wisely provided that hearings be conducted by individuals "not involved in the education of the child"; however, this criterion does not impute bias to the Secretary who supervises the educational system for of hundreds of thousands of children but is not directly involved in providing them an education.

It is nonsense to suggest that a higher level of impartiality is required of education decision-makers than of welfare decision-makers who, in determining eligibility for medical and subsistence benefits, hold in balance the very survival of those who come before them.

In determining the level of impartiality which the EHA requires, the Court should be guided by the principle established in Goldberg v. Kelly, 397 U.S. 254, 271, (1970) where the Court said that:

> ...prior involvement will not necessarily bar a welfare official from acting as a decision-maker. He should not, however have participated in making the determination under review.

The Secretary's only prior involvement in matters that come before him for review would be his participation in formulating educational policy. He is

far removed from disputes which arise in connection with the formulation of an appropriate IEP in a particular case. To assume that the Secretary will be biased in favor of the school district in a dispute over a child's IEP defies logic and common sense, presuming bad faith without any factual basis. Implicit in such an assumption is that the Secretary, who has sworn to uphold the Constitution and laws of his State and of the United States, will ignore the mandate of the law and the guidance of the courts in interpreting that law.

It is respectfully suggested that such an assumption is not tenable as a matter of principle.

2. Muth and his amici go on to argue that participation of the Secretary, or his counterpart, in the review process is a practice found in only a few States. However, the issue

before the Court merits consideration in light of Congressional intent as expressed in the EHA, it should not be decided by a show of hands from the participating States.

The position taken by the United States Department of Education [DOE] in an informal letter of January 16, 1984 [Br. of Amici for Resp. Exhibit B] is similarly irrelevant because it is not part of the record.[12]

---

[12]Although an agency's interpretation of the statute under which it operates is entitled to some deference, the Court has said that "this deference is constrained by our obligation to honor the clear meaning of the statute, as revealed by its language, purpose and history." Southeastern Community College v. Davis, 442 U.S. 397, 411 (1979). Quoting Teamsters v. Daniel, 439 U.S. 551, 566 n.20 (1979).

Moreover, we note that the interpretation of the DOE on this issue has been neither consistent nor longstanding.

(FOOTNOTE CONTINUED ON NEXT PAGE)

(FOOTNOTE CONTINUED)

Apparently, until court decisions held otherwise, the agency had consistently approved State plans in which the Secretary or his counterpart participated in the review process. It officially altered its position after these court decisions came to its attention; therefore, this Court should give no more deference to the agency position than it does to the opinions of the lower courts. Finally, the agency itself does not seem completely persuaded by these decisions since it has continued to approve State plans, such as Pennsylvania's, which incorporate this system. These facts substantially diminish the force of the agency's position and consequently diminish the deference to be given to DOE's present interpretation of the statute.

CONCLUSION

For the foregoing reasons, petitioner asks the Court to reverse the judgment of the Court of Appeals.

ERNEST D. PREATE, JR.
Attorney General

By: MARIA PARISI VICKERS
Senior Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

DATE: February 13, 1989

Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1855 (4)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THOMAS K. GILHOOL, Petitioner,

v.

RUSSELL A. MUTH, JR., et al., Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER

Lacy H. Thornburg
Attorney General

Edwin M. Speas, Jr.
Special Deputy Attorney General
North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602

Counsel for Amicus Curiae
Counsel of Record

26 pp

QUESTIONS PRESENTED

1. WHETHER CONGRESS ABROGATED THE ELEVENTH AMENDMENT IMMUNITY OF THE STATES WHEN IT ENACTED THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT?

2. WHETHER CONGRESS DENIED TO THE STATES THE AUTHORITY TO MOLD THEIR ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT WHEN IT ENACTED THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT?

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENTS 5

I. THE ELEVENTH AMENDMENT BARS THE AWARD OF DAMAGES AGAINST THE STATES FOR VIOLATION OF THE EHCA. 7

II. IN ENACTING THE EHCA, CONGRESS DID NOT, AND COULD NOT, DENY TO THE STATES THE AUTHORITY TO MOLD THE ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT. 13

CONCLUSION 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed2d 171 (1985) 10
Board of Education v. Dienelt, 843 F.2d 813 (4th Cir. 1988) 8
David D. v. Dartmouth School Committee, 775 F.2d 411, 422 (1st Cir. 1985) 11
Doe by Gonzales v. Maher, 793 F.2d 1470 (9th Cir. 1986) 12
Employees v. Missouri Public Health and Welfare Department, 411 U.S. 279, 284, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973) 10
Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) 9
Fullilove v. Klutznick, 448 U.S. 448, 474-475, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) 9
Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 1005 S.Ct. 105, 83 L.Ed.2d 1016 (1985) 10
Gary A. v. New Tier High School District No. 203, 796 F.2d 940 (7th Cir. 1986) 12
Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) 8
Hall v. Vance County Board of Education, 774 F.2d 629, 634-635 (4th Cir. 1985) 8
Hendrick Hudson School Board v. Rowley, 458 U.S. 176, 205-207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) 7
Hutto v. Finney, 437 U.S. 678, 697 fn. 27, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) 10
Kattan by Thomas v. District of Columbia, 691 F.Supp. 1539 (D.D.C. 1988) 8
Keyes v. School District No. 1, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973) 8
Lau v. Nichols, 414 U.S. 563, 569, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974) 9

Max M. v. Illinois State Board of Education, 684 F.Supp. 514 (N.D. Ill. 1988) 8
Miener v. State of Missouri, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1983) 12
Olim v. Wakinekona, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) 8
Pennhurst State School And Hospital v. Halderman, 451 U.S. 1, 16-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981) 9,15
Plyler v. Doe, 457 U.S. 202, 230, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) 8
South Dakota v. Dole, 483 U.S. ___, 107 S.Ct. 2793, 97 L.Ed 2d 171 (1987) 9
Victoria L. v. District School Board, 741 F.2d 369, (11th Cir. 1984) 15
Village of Arlington Heights v. Metropolitian Housing Department Corp., 429 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977) 8
Washington v. Davis, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1987) 8
Welch v. Department of Highways & Public Transportation, 483 U.S. ___, 107 S.Ct. 2941, 97 L.Ed. 2d 389 (1987) 10
Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amend. 10 ..... Passim
U.S. Constitution, Amend. 11 ..... Passim
N.C. Const., Art. I, § 15 1,16
N.C. Const., Art. VI, § 7 16
N.C. Const., Art. IX, § 2 1
N.C. Const., Art. IX, § 5 3

STATUTORY PROVISIONS

N.C. Gen. Stat. § 115C-10 (1985) 16
N.C. Gen. Stat. § 115C-110(a) (1977) 4, 5, 13
N.C. Gen. Stat. § 115C-116 (1977) 4
20 U.S.C. § 1400 (b)(9) 7
20 U.S.C. § 1400(c) 12

20 U.S.C. § 1401(7) 13
20 U.S.C.§ 1412(6) 13,16
20 U.S.C. § 1415 16
20 U.S.C.§ 1415 (b)(2) 14
20 U.S.C. § 1415(e)(4)(B) 11
20 U.S.C. § 1415(e)(4)(G) 11
29 U.S.C. § 794 12
40 U.S.C. § 1400, et seq. 2
42 U.S.C. § 2000d 12
42 U.S.C. § 2000d-7 12
42 U.S.C. § 2000d-7(e)(1) 12
42 U.S.C. § 6102 12

MISCELLANEOUS

40 N.C. Att'y Gen. Op. 248 (1969) 12
1974 N.C. Sess. Laws, c. 1293 2
1977 N.C. Sess. Laws, c. 563 2
1988 N.C. Sess. Laws, c. 1079 3
1988 N.C. Sess. Laws, cc. 886 & 108 4
1975 U.S. Code Congressional and Administrative
News, pp. 1453, 1470 and 1500-152 14

NO. 87-1855

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

THOMAS K. GILHOOL, Petitioner,

v.

RUSSELL A. MUTH, JR., et al., Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER

INTEREST OF AMICUS CURIAE

Resolution of both issues presented for determination in the matter is of substantial importance to the State of North Carolina. Because of the importance of these issues to the State, this brief is filed on behalf of the State by its Attorney General pursuant to Rule 36.4 of the Rules of the Supreme Court.

For many years, North Carolina has been committed to assuring that handicapped children receive an appropriate education. In 1969, the Attorney General concluded that Article I, § 15 and Article IX, § 2 of the North Carolina Con-

stitution require that handicapped children be afforded the same educational opportunity as other children. 40 N.C. Att'y Gen. Op. 248 (1969).[1] In 1974 the General Assembly directed that "the State develop a system of educational opportunities for all children with special needs." 1974 N.C. Sess. Laws, c. 1293. In 1977 this system was put in place in the form of comprehensive legislation modeled after the Education of All Handicapped Children Act, 40 U.S.C. § 1400, *et seq.* (EHCA). 1977 N.C. Sess. Laws, c. 563, codified as N.C. Gen. Stat. § 115C-106 *et seq.* (1977). The State's commitment to handicapped children is manifest in the level of funds appropriated by the General Assembly each year for the education of handicapped children over and above the funds appropriated for the education of non-handicapped children. For the 1988-89 fiscal year the General Assembly appropriated $1,601.00 more for the education of each handicapped child enrolled in the public schools than for the education of each non-handicapped child.[2] This special funding totals approximately $230,000,000.00.

---

1 Article I, 15 provides: "The people have a right to the privilege of an education, and it is the duty of the State to guard and maintain that right." Article IX, 2 provides, in pertinent part: "The General Assembly shall provide by taxation and otherwise for a general and uniform system of free public schools ... wherein equal opportunities shall be provided for all students."

2 Derived from 1988 appropriations acts by the Controller's Office, North Carolina State Board of Education.

At t he same time, North Carolina has a significant interest in preserving the Eleventh Amendment immunity of its fisc. While the General Assembly's appropriation for the public elementary and secondary schools is great - the State's appropriation for the public school system in 1988-89 was approximately $3,000,000,000.00 [3] - its resources are not unlimited. Court-ordered diversions of funds for certain programs or students necessarily impact on other programs and students, and limit the State's discretion to balance the interests and needs of all students. This interest has special force because of the low level of federal financial support derived by the State from participating in the EHCA. While the State appropriated an average of $4,007 for the education of each handicapped child enrolled in the public schools during the 1988-89 fiscal year, it only received $308 from the federal government for the education of each of those children.[4]

Further, the State has an overriding interest in molding the administrative process for reviewing the complaints of handicapped children to its form of government. Article

---

3 1988 N.C. Sess. Laws, cc. 886 and 1086.

4 Derived from North Carolina's EHCA allocations for the 1988-89 fiscal year by the Controller's Office, State Board of Education.

IX, § 5 of the Constitution of North Carolina provides: "The State Board of Education shall supervise and administer the free public school system ... subject to laws enacted by the General Assembly." Consistent with this provision of the Constitution, the General Assembly has assigned to the State Board of Education responsibility for assuring that each local school board provide appropriate educational opportunities to handicapped children.[5] N.C. Gen. Stat. § 115C-110(a) (1977) provides: "The Board shall cause to be provided by all local school administrative units ... special education and related services appropriate to all children with special needs."

The General Assembly has also established an administrative process for reviewing complaints by parents of handicapped children that local school systems have not provided their children with an appropriate education. Prior to July 1988, this process provided for initial administrative review by hearing officers appointed by local school boards and for an appeal to hearing officers appointed by the State Superintendent of Public Instruction. N.C. Gen. Stat. § 115C-116 (1977). In July 1988, the General Assembly amended this statute, 1988 N.C. Sess. Laws, c. 1079, to provide that the State Board of Education will make the final administrative decision following a single hearing conducted by an administrative law judge assigned by the North Carolina Office of Administrative Hearings based upon the recommended

---

5 There are 140 local school systems in North Carolina. Each is governed by a locally elected or appointed school board. N.C. Gen. Stat. § 115C-35 (1955). These local boards exercise "general control and supervision of all matters pertaining to the public schools in their respective local school administrative units" subject to the "paramount powers" of the State Board of Education. N.C. Gen. Stat. § 115C-40 (1955). North Carolina, thus, is part of the "deeply rooted" tradition of "local control over the operation of schools." *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 50, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).

decision, including findings of fact and conclusions of law, of the administrative law judge. This amendment brought this process into conformity with Article IX, § 5 of the Constitution, which confers on the State Board of Education the responsibility to "supervise and administer" the public school system, and N.C. Gen. Stat. § 115C-110(a) (1977), which makes the State Board responsible for assuring that local school systems provide an appropriate education for handicapped children. This new process and the State's right to make this process conform to its form of government have been placed in jeopardy by the Third Circuit's decision. Indeed, the validity of this process has been challenged in federal court. *Hedrick v. State of North Carolina*, No. C-88-843-G (M.D.N.C.).

SUMMARY OF ARGUMENTS

The Third Circuit's decision that Congress has waived the Eleventh Amendment immunity of the States for violation of the EHCA is wrong in two respects. First, Congress does not have that power. The EHCA, to some extent, was enacted by Congress pursuant to its Fourteenth Amendment powers. Primarily, however, the EHCA was enacted by Congress pursuant to its spending power. Congress' spending power is not unlimited. North Carolina submits that Congress' power under the Spending Clause is limited by other provisions of the Constitution that limit its power. The Eleventh Amendment limits Congress' power. Therefore, Congress does not have the power to require the States to waive their Eleventh Amendment immunity as a condition to participating in the EHCA, except where a violation of the EHCA is also a violation of the Fourteenth Amendment.

Second, even if Congress has the power to waive the Eleventh Amendment immunity of the States for violation of the EHCA, it did not properly exercise that power in enacting the EHCA. Even where Congress has the power to waive the Eleventh Amendment immunity of the States, two restraints exist upon the exercise of that power. First, Congress must consider the wisdom of the exercise of that power. This is required because to waive the States' immunity

without weighing the wisdom of that decision infringes the States' right to participation in the legislative process as guaranteed by the Tenth Amendment. Second, Congress must express any decision to waive the Eleventh Amendment immunity of the States in clear and unambiguous terms. A clear, unambiguous expression of such a decision is required in order to assure the States' Tenth Amendment rights. It is also required underSpending Clause legislation, like the EHCA, because such legislation is in the nature of a contract, and the States are entitled to know, in advance, the terms and conditions of their participation. Nothing in the EHCA, the amendments to the EHCA, or any other act indicates that Congress has considered the wisdom of waiving the Eleventh Amendment immunity of the States for violations of the EHCA. Nothing in the EHCA, the amendments to the EHCA or any other act amounts to a clear and unambiguous expression of a decision to waive that immunity for violations of the EHCA.

The Third Circuit's decision that Pennsylvania's Secretary of Education is prohibited by the EHCA from making the final administrative decision regarding complaints made by parents of handicapped children is also wrong in two respects. First, the decision is inconsistent with Congress' intention. Congress deemed it of paramount importance that State educational agencies be ultimately responsible for assuring that local educational agencies provide handicapped children with an appropriate education. To interpret the EHCA as denying to State educational agencies the authority to make final administrative decisions regarding complaints by parents that local school systems have not provided their children with an appropriate education, is completely at odds with Congress' intention that State educational agencies have the ultimate responsibility for assuring that handicapped children receive an appropriate education. The Third Circuit's decision divides the ultimate responsibility for assuring that all children receive an appropriate education from the responsibility to provide that assurances in a particular case, and divides the ultimate responsibility for assur-

ing that handicapped children receive an appropriate education from the authority to enforce that responsibility in a particular case.

Second, the EHCA does not impose obligations on the States not stated unambiguously. The EHCA does not unambiguously deny the States the authority to confer upon their State-level educational agencies the authority to act as the final administrative decision-maker on the complaints of handicapped children. Further, to infer this obligation infringes the Tenth Amendment. Where requirements have to be inferred, meaningful participation of the States through their elected representatives in the enactment of legislation guaranteed by the Tenth Amendment cannot have occurred

ARGUMENTS

I. THE ELEVENTH AMENDMENT BARS THE AWARD OF DAMAGES AGAINST THE STATES FOR VIOLATION OF THE EHCA.

Two Eleventh Amendment issues are present in this matter. The threshold question is whether Congress has the power to require States to surrender their Eleventh Amendment immunity as a condition for participating in the EHCA. If Congress has that power, then the question arises whether Congress has exercised that power unequivocally. We begin with the threshold issue.

A. Congress does not have the power to waive the Eleventh Amendment immunity of the States under the Spending Clause.

The EHCA embodies Fourteenth Amendment principles, 20 U.S.C. § 1400(b)(9), but its reach far exceeds those principles. Compliance with the EHCA is measured by adherence to detailed procedures regarding the identification, evaluation and development of individual education programs for handicapped children, and through assuring an opportunity for those children to an "appropriate education". *Hendrick Hudson School Board v. Rowley*, 458 U.S. 176, 205-

207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Failure to adhere to these detailed procedures is not in and of itself a violation of the Due Process Clause of the Fourteenth Amendment. See *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) ("Process is not an end in itself. Its constitutional purpose is to protect a substantive interest of an individual; it cannot be the right to demand needless formality"). A due process violation occurs only if a school system excludes a handicapped child from school or otherwise denies his substantive interests without providing him constitutionally sufficient notice and hearing. *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Similarly, failure to provide a handicapped child with an "appropriate education" is not in and of itself a violation of the Equal Protection Clause of the Fourteenth Amendment. An equal protection violation occurs only if a school system denies handicapped children as a group any education, *Plyler v. Doe*, 457 U.S. 202, 230, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), or if a particular child is intentionally discriminated against because of his handicap. *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973); *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Village of of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).

In all but a few cases, the EHCA violation asserted is not also a violation of the Fourteenth Amendment. In this case, for example, the violations asserted by Mr. Muth do not have a Fourteenth Amendment dimension. See also *Board of Education v. Dienelt*, 843 F.2d 813 (4th Cir. 1988) (EHCA violated because a multi-disciplinary review not conducted and parents not sufficiently involved); *Hall v. Vance County Board of Education*, 774 F.2d 629, 634-635 (4th Cir. 1985) (EHCA violated because school system did not advise parents of possibility of public funding for tutor or private residential placement and insufficiency of academic program); *Kattan by Thomas v. District of Columbia*, 691 F.Supp. 1539 (D.D.C. 1988) (EHCA violated because public school program for child did not include sufficient occupational therapy); *Max*

M. v. Illinois State Board of Education, 684 F.Supp. 514 (N.D. Ill. 1988) (EHCA violated by failure to provide psychotherapy).

If the States violate the Fourteenth Amendment, Congress has the power to waive their Eleventh Amendment immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976). Accordingly, if a State violates a Fourteenth Amendment right of a handicapped child, Congress would have the power, though it has not exercised it, to waive the Eleventh Amendment immunity of the State for that violation. However, in those cases where the EHCA violation asserted and found is not also a violation of the Fourteenth Amendment, Congress has not proscribed that violation pursuant to the Fourteenth Amendment. It has acted pursuant to its spending power.

The EHCA is primarily Spending Clause legislation, *Pennhurst State School And Hospital v. Halderman*, 451 U.S. 1, 16-18, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), and this Court has so held. *Rowley*, 458 U.S. at 204 fn. 24. Congress' power under the Spending Clause is limited. *Fullilove v. Klutznick*, 448 U.S. 448, 474-475, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980); *Lau v. Nichols*, 414 U.S. 563, 569, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974). It cannot under the Spending Clause exercise a power denied it by another part of the Constitution. The Eleventh Amendment is a limit on Congress' power. *South Dakota v. Dole*, 483 U.S. ____, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) is not to the contrary. There the Court held that Congress through its spending power may impose conditions on the States even though the conditions indirectly impact upon powers granted to the States by the Twenty-First Amendment. The Eleventh Amendment is not a grant of powers to the States. It is a limitation on the powers of Congress. Congress under the Spending Clause cannot exercise a power denied it by the Eleventh Amendment.

B. Even if it has the power, Congress has not waived the Eleventh Amendment immunity of the States.

Where Congress has the power to waive the Eleventh Amendment immunity of the States, it must consider the wisdom of waiving the immunity of the States. *Hutto v. Finney*, 437 U.S. 678, 697 fn. 27, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Employees v. Missouri Public Health and Welfare Department*, 411 U.S. 279, 284, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973). If it decides to waive their immunity, Congress must then make its decision "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). See also *Welch v. Department of Highways & Public Transportation*, 483 U.S. ____, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987). Consideration of the immunity of the States and unmistakably clear language evidencing a decision to waive that immunity are required in this case for two reasons. First, failure to weigh the States' interests in the area of elementary and secondary education infringes the Tenth Amendment. *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (the Tenth Amendment rights of the States are protected through their participation in the political process); *Wisconsin v. Yoder*, 406 U.S. 205, 213, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("Providing public education ranks at the very apex of the function of a State"). Second, legislation enacted under the Spending Clause, like the EHCA, is "in the nature of a contract". Thus, the States are entitled to know their obligations and liabilities in advance in order that they may make an informed decision to participate or not participate. *Rowley*, 458 U.S. at 204, fn. 26, quoting *Pennhurst*, 451 U.S. at 17. Clear, unambiguous language is especially required where, as here, the level of federal funding actually provided does not correspond to the obligations imposed. *Pennhurst*, 451 U.S. at 24 ("It defies common sense, in short, to suppose that Congress [without providing adequate funding] implicitly imposed this massive obligation on participating States").

Nothing in the EHCA as originally enacted, or its legislative history, indicates that Congress ever considered the wisdom of waiving or not waiving the Eleventh Amendment immunity of the States. Nothing in the EHCA amounts to a clear unambiguous statement that Congress intended to

waive that immunity. To the extent that courts have found a waiver they have found it necessary to infer an intention to waive. See *David D. v. Dartmouth School Committee*, 775 F.2d 411, 422 (1st Cir. 1985). An inferred waiver is *ipso facto* not the "unmistakably clear" waiver "in the language of the statute" required by *Atascadero*.

The Third Circuit inferred an intention by Congress to waive the Eleventh Amendment immunity of the States from 1986 amendments to the EHCA, specifically an amendment to 20 U.S.C. § 1415(e)(4)(B) authorizing the award of attorneys' fees. 839 F.2d at 129. That statute does authorize the award of attorneys' fees to prevailing parents. It does not, however, specifically set forth against whom the fees may be awarded. To find an intention by Congress to award fees against a State it is necessary to infer that intent from 20 U.S.C. § 1415(e)(4)(G). That is the only subsection that contains a reference to the States. It provides: "The provision of subparagraph (G) [which contains limitations on fees] shall not apply in any action if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of Section 615 of this Act." More importantly, the power of Congress to authorize attorneys' fees against a State exists separately and independently of its power to authorize the award of damages against a State. *Hutto v. Finney*, 437 U.S. at 696-698 (Costs, including attorneys' fees, treated differently for Eleventh Amendment purposes than damages).

It has also been suggested that Congress waived the Eleventh Amendment immunity of the States when it enacted the Civil Rights Remedies Equalization Act in 1986, 20 U.S.C. §2000d-7(e)(1). That statute is an "unmistakably clear" waiver of the Eleventh Amendment immunity of the States for violation of several enumerated acts. The EHCA, however, is not one of those acts. The statute provides:

> A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of section 504 of the Rehabilitation Act of 1973, title

> IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

This statute does not unmistakably reflect a decision by Congress to waive the Eleventh Amendment immunity of the States for violation of the EHCA. It is not even named. Moreover, the EHCA is different in structure and purpose from the specified statutes. The EHCA is comprehensive legislation enacted for the various purposes stated in 20 U.S.C. § 1400(c). Prohibition of discrimination is not among the purposes expressly stated. On the other hand, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, the Age Discrimination Act of 1975, 42 U.S.C. § 6102, and title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, are succinct, explicit anti-discrimination statutes. To conclude that 42 U.S.C. § 2000d-7(e)(1) is an unmistakably clear waiver of the Eleventh Amendment immunity of the States for violation of the EHCA is tantamount to concluding that Congress can effectively repeal the States' immunity once and for all by enacting a statute simply providing "the Eleventh Amendment is waived."

As 42 U.S.C. § 2000d-7 reflects, Congress is fully aware that in order to waive the States' immunity it first must consider the wisdom of waiving the Eleventh Amendment immunity and then act with precision if it decides to waive that immunity. At the time it enacted that statute, the Seventh, Eighth and Ninth Circuits had held that the Eleventh Amendment protects the States from liability arising out of the EHCA. *Gary A. v. New Tier High School District No. 203*, 796 F.2d 940 (7th Cir. 1986); *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir.), *cert. denied*, 459 U.S. 909 (1983); *Doe by Gonzales v. Maher*, 793 F.2d 1470 (9th Cir. 1986). Presumably, Congress was aware of these decisions. Consequently, one would assume if Congress had intended to waive the Eleventh Amendment immunity for EHCA violations when it enacted 42 U.S.C. § 2000d-7 it would have specifi-

cally identified the EHCA. Therefore, its failure to do so is not indicative of an intent to waive the States' immunity, rather it is indicative of an intent not to waive that immunity.

II. IN ENACTING THE EHCA, CONGRESS DID NOT, AND COULD NOT, DENY TO THE STATES THE AUTHORITY TO MOLD THE ADMINISTRATIVE PROCESS FOR REVIEWING THE COMPLAINTS OF PARENTS TO THEIR FORM OF GOVERNMENT.

The Third Circuit Court of Appeals effectively held that the EHCA denies to a State the power to assign to the governing official or board of its State-wide public school system the power to make the final administrative decision regarding the complaints of parents that local school systems have denied their handicapped children an appropriate education. The rules of statutory construction do not permit that interpretation. Further, the Third Circuit's interpretation violates the Tenth Amendment to the Constitution.

A. The Third Circuit's interpretation is inconsistent with the intent of Congress.

The North Carolina General Assembly has directed the State Board of Education "to cause to be provided by all local school administrative units . . . special education and related services appropriate to all children with special needs." N.C. Gen. Stat. § 115C-110(a) (1977). Federal law mirrors this responsibility. For purposes of the EHCA, the State Board of Education is a "State educational agency." 20 U.S.C. § 1401(7). In order to receive federal funding, a State's educational agency must be "responsible for assuring" that all local school systems provide required appropriate educational opportunities to handicapped children. 20 U.S.C. § 1412(6). This requirement is explained in the legislative history of the EHCA.

> The committee bill requires that the State educational agency be responsible for assuring that all requirements of the Act are carried out . . . . This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency.
>
> The committee considers the establishment of a single agency's responsibility for assuring the right to education of all handicapped children of *paramount importance*. . . . While the committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, *so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency.*

1975 U.S. Code Congressional and Administrative News, p. 1448. (Emphasis added). See also p. 1492.

The Third Circuit's decision that "a State educational agency" is precluded from making the final administrative decision on the complaints of parents of handicapped children was based largely upon the provisions of 20 U.S.C. § 1415(b)(2), which provides:.

> The parent or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

For a number of reasons, North Carolina submits that nothing in the EHCA precludes a "State educational agency" from making the final administrative decision on complaints filed by the parents of handicapped children regarding the appropriateness of the education offered or provided their children by local school systems. Indeed, to vest that authority in a "State educational agency" is entirely consistent with Congress's intention in enacting the EHCA. Arguments to the contrary, as the Eleventh Circuit Court of Appeals has held, are "frivolous". *Victoria L. v. District School Board*, 741 F.2d 369, 374 (11th Cir. 1984).

In enacting the EHCA, Congress deemed it of "paramount importance" that "in carrying out a right to education for handicapped children, the State educational agency shall be the responsible agency." Centralized authority was necessary so that "violation of the right of handicapped children is squarely the responsibility of one agency." 1975 U.S. Code Congressional and Administrative News, p. 1448. North Carolina's statute conferring authority on the State Board of Education to make the final administrative decision on complaints by parents regarding the failure of local school systems to provide them with an appropriate education squarely conforms with this congressional intention.

In this case, the Third Circuit divided the responsibility to assure that all children receive an appropriate education from the responsibility to provide that assurance in a particular case, and divided the responsibility to assure that handicapped children receive an appropriate education from the authority to enforce that responsibility in a particular case. In so doing, the Third Circuit cast aside the principle of centralized responsibility that Congress had considered to be of "paramount importance" to the effective enforcement of the EHCA. As a result the decision below is not only illogical, but also contrary to the primary rule of statutory construction that all the parts of a statute must be construed in accordance with Congress's intention. *Pennhurst*, 451 U.S. at 18. ("In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the whole law, and to its object and policy.")

Furthermore, the interpretation of 20 U.S.C. § 1415 adopted by the Third Circuit is not consistent with the legislative history of the EHCA. The legislative history of the EHCA indicates that the only persons barred from making final decisions under 20 U.S.C. § 1415 are persons "directly involved in the education or care of the child." 1975 U.S. Code Congressional and Administrative News, pp. 1453, 1470 and 1500-1502. North Carolina's State Board of Education does not directly provide educational services to children. Further, "no public school employee paid from State or local funds, and no employee of the Department of Public Instruction [the administrative agency of the State Board of Education] or his spouse, may serve as an appointive member of the State Board of Education." N.C. Gen. Stat. § 115C-10 (1985).

Finally, North Carolina is especially troubled by the Third Circuit's opinion that Congress intended to prohibit a State educational agency from making final decisions because the agency would be predisposed to rule against parents. 839 F.2d at 124. That unsubstantiated opinion flies in the face of Congress's specific decision to impose on State educational agencies ultimate responsibility for assuring that handicapped children receive an appropriate education. 20 U.S.C. § 1412(6). Furthermore, it is offensive and contrary to the oath of members of the State Board of Education "to guard and maintain" the "right to the privilege of an education." N.C. Const., Art I, § 15; Art. VI, § 7.

B. The EHCA does not impose obligations on the States not stated unambiguously. To infer an obligation on States to establish an administrative process for reviewing and deciding complaints in a manner inconsistent with their form of government infringes the Tenth Amendment.

The EHCA, as noted above, is Spending Clause legislation. When Congress acts pursuant to its spending power to impose obligations on the States as a condition to the receipt of funds, it must make those obligations clear and unambiguous. This is so for two reasons. First, such legislation

often "intrudes on traditional state authority." *Pennhurst*, 451 U.S. at 16. Second, such legislation "is in the nature of a contract." Thus, the States are entitled to know their obligations in advance of accepting funds. *Rowley*, 458 U.S. at 204, fn. 26, quoting *Pennhurst*, 451 U.S. at 17. As a consequence of Congress' duty to make clear the requirements it is imposing on the States, requirements not unambiguously stated are not enforceable against the States. *Pennhurst*, 451 U.S. at 18; *Rowley*, 458 U.S. at 200. Congress did not unambiguously impose an obligation on States accepting EHCA funds to deny to State educational agencies the power to make final administrative decisions. The lack of an unambiguous prohibition is made clear by the Third Circuit's need to infer that prohibition. 839 F.2d at 120-126.

The requirement that Congress unambiguously set forth the obligations imposed on the States has a Tenth Amendment dimension. The States' rights under the Tenth Amendment are primarily protected through their participation in the legislative process. *Garcia*, 469 U.S. at 550-554. Where requirements have to be inferred, meaningful participation by the States through their elected representatives cannot have occurred. In this case, the Third Circuit has inferred a requirement that strikes at the very heart of the heretofore unquestioned authority of the States to establish an administrative process that conforms to their form of government. Such a requirement, if it can be imposed at all, certainly cannot be inferred.

CONCLUSION

North Carolina urges the Court to reverse the Third Circuit Court of Appeals, and to hold that Pennsylvania has properly vested in its Secretary of Education the power to make the final administrative decisions regarding the EHCA complaints of parents of handicapped children and that the Eleventh Amendment bars the award of damages against the States.

Respectfully submitted, this the 1st day of December, 1988.

LACY H. THORNBURG
Attorney General

*Edwin M. Speas, Jr.
Special Deputy Attorney General
N.C. Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7387
COUNSEL FOR AMICUS CURIAE,
THE STATE OF NORTH CAROLINA

*Counsel of Record

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am a Special Deputy Attorney General for the State of North Carolina, and that I have served copies of the foregoing BRIEF OF AMICUS CURIAE THE STATE OF NORTH CAROLINA IN SUPPORT OF THE PETITIONER by depositing same in the United States mail first class postage prepaid, to:

Maria Parisi Vickers
Chief Deputy Attorney General
Office of the Attorney General
206 State Office Building
Philadelphia, PA. 19130
Counsel for Petitioner

Joane D. Sommer
Eastburn & Gray
60 East Court Street
Doylestown, PA 18901
Counsel for Central Bucks School District

Russel A. Muth, Jr.
66 Springs Drive
Doylestown, PA 18901
Petitioner, Pro se

Leonard Rieser
Education Law Center, Inc.
2100 Lewis Tower Building
225 South 15th Street
Philadelphia, PA 19102
Counsel for *Amici Curiae* Pennsylvania Protection & Advocacy, Inc. and Pennsylvania Association for Children & Adults with Learning Disabilities

This the day 1st of December, 1988.

_____
Edwin M. Speas, Jr.
Special Deputy Attorney General

No. 87-1855

Supreme Court, U.S.
FILED
JAN 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS K. GILHOOL

Petitioner,

v.

RUSSELL A. MUTH, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN COUNCIL OF THE BLIND, AMERICAN SOCIETY FOR DEAF CHILDREN, CHILDREN'S DEFENSE FUND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, MENTAL HEALTH LAW PROJECT, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION, UNITED CEREBRAL PALSY ASSOCIATIONS, INC., UNITED CEREBRAL PALSY OF NEW YORK CITY, AND WESTERN NEW YORK DISABILITY LAW COALITION AS *AMICI CURIAE*

MINNA J. KOTKIN*
KATHLEEN A. SULLIVAN
Brooklyn Law School
One Boerum Place
Brooklyn, New York 11201

ELLEN M. SAIDEMAN
HERBERT SEMMEL
New York Lawyers
for the Public Interest, Inc.
135 East 15th St.
New York, New York 10003

ELIZABETH LOTTMAN SCHNEIDER
Monroe County Legal Assistant Corp.
87 North Clinton Ave., Suite 200
Rochester, New York 14604

Attorneys for Amici Curiae

**Counsel of Record*

January 20, 1989

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iii
INTEREST OF AMICI	1
STATEMENT OF THE CASE	6
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. TUITION REIMBURSEMENT IS AN ESSENTIAL REMEDY TO INSURE THAT ALL HANDICAPPED CHILDREN RECEIVE A FREE APPROPRIATE EDUCATION	8
A. Without a Tuition Reimbursement Remedy, over 250,000 Handicapped Children Will Be Denied the Protection of the EHA	8
B. Tuition Reimbursement Furthers, Rather than Frustrates, the Central Goals of the EHA	11
II. THE ELEVENTH AMENDMENT DOES NOT BAR TUITION REIMBURSEMENT	12
A. The 1986 Amendments to the Rehabilitation Act Demonstrate Congress' Intent to Abrogate States' Eleventh Amendment Immunity for Violations of the EHA	12
B. Tuition Reimbursement Actions against State Agencies Are Authorized under the Rehabilitation Act Amendments and a Bar to Such Actions under the EHA Would Be Futile	15

PAGE

III. THIS COURT NEED NOT REACH THE QUESTION OF WHETHER A CHIEF STATE SCHOOL OFFICER MAY SERVE AS THE REVIEW OFFICER IN SPECIAL EDUCATION APPEALS 17

IV. AS A MATTER OF LAW, THE EHA PRECLUDES A CHIEF STATE SCHOOL OFFICER FROM SERVING AS REVIEW OFFICER IN SPECIAL EDUCATION APPEALS 18

A. The EHA's Procedural Structure Precludes a Chief State School Officer from Serving as an Impartial Review Officer..... 19

B. Chief State School Officers Have Fiscal, Policy, and Supervisory Responsibilities Inconsistent with the Role of Impartial Review Officer 23

C. The Secretary Can Carry Out His Monitoring and Enforcement Responsibilities under the EHA without Serving as Review Officer 27

V. SHOULD THE COURT FIND THAT THE EHA DOES NOT BAR A CHIEF STATE SCHOOL OFFICER FROM SERVING AS REVIEW OFFICER AS A MATTER OF LAW, THE COURT SHOULD REMAND THIS CASE FOR DEVELOPMENT OF THE RECORD ON THE SECRETARY'S IMPARTIALITY..... 28

CONCLUSION 30

PAGE

TABLE OF AUTHORITIES

Cases

Atascadero State Hospital v. *Scanlon*, 473 U.S. 234 (1985) 14, 15

Board of Education v. *Rowley*, 458 U.S. 176 (1982) 2, 3, 4, 5, 18

Brandon E. v. *Wisconsin Dept. of Pub. Instruction*, 595 F. Supp. 740 (E.D. Wis. 1984) 21

Burlington School Committee v. *Dept. of Education*, 471 U.S. 359 (1985) 7, 8, 9, 10, 11, 16, 18

Chevron, U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 22-23

Colin K. v. *Schmidt*, 715 F.2d 1 (1st Cir. 1983) 21

Colorado v. *Connelly*, 479 U.S. 147 (1986) 4

Digre v. *Roseville Schools Independent School District No. 623*, 841 F. 2d 245 (8th Cir. 1988) 16

Gebhardt v. *Ambach*, [1982-83] Educ. Hand. L. Rep. (CRR) 544: 1130 (W.D.N.Y. 1982) 5

Goldberg v. *Kelly*, 397 U.S. 254 (1970) 23-24

Grymes v. *Madden*, 672 F.2d 321 (3d Cir. 1982) 21

Harris v. *McRae*, 448 U.S. 297 (1980) 13

Helms v. *McDaniel*, 657 F.2d 800 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982) 21, 24

Holmes v. *Sobol*, 690 F. Supp. 154 (W.D.N.Y. 1988) 5, 21, 25

Honig v. *Doe*, 108 S.Ct. 592 (1988) 4, 18, 21

PAGE

J.G. v. *Rochester Bd. of Education*, 830 F.2d 444 (2d Cir. 1987) 5

Kotowicz v. *Mississippi St. Bd. of Educ.*, 630 F. Supp. 925 (S.D. Miss. 1986) 21

Louis M., v. *Ambach*, No. 86-CV 919 (CGC) (N.D.N.Y. filed Aug. 13, 1986) 5, 25

Martinez v. *School Board of Hillsborough*, 861 F.2d 1502 (11th Cir. 1988) 16

Mayson v. *Teague*, 749 F.2d 652 (11th Cir. 1984) 21, 26

Michael M. v. *Board of Education*, 686 F. Supp. 995 (E.D.N.Y. 1988) 25

Mrs. W. v. *Tirozzi*, 832 F. 2d 748 (2d Cir. 1987) 16

New York State Ass'n of Retarded Children v. *Carey*, 393 F. Supp. 715 (E.D.N.Y. 1975) 2

O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 2

Pennsylvania Ass'n for Retarded Children v. *Pennsylvania*, 334 F. Supp. 279 (1972) 21

Robert D. v. *Sobol*, 688 F. Supp. 861 (S.D.N.Y.), *appeal dismissed*, No. 88-7444 (2d Cir. 1988) 10, 25

Robert M. v. *Benton*, 634 F.2d 1139 (8th Cir. 1980) .. 21

Smith v. *Robinson*, 468 U.S. 992 (1984) 2

Tessar v. *Mounds View Indep. School Dist.*, No. 3-88-342 (D. Minn. filed May 25, 1988) 26, 29

United States Department of the Treasury v. *Galioto*, 471 U.S. 556 (1986) 4

Victoria L. v. *District School Bd. of Lee Co.*, 741 F.2d 369 (11th Cir. 1984) 21

Vogel v. *School Bd. of Montrose*, 491 F. Supp. 989 (W.D. Mo. 1980) 21

PAGE

Federal Statutes and Regulations

Pub. L. 99-500, § 1003(a)(1), 100 Stat. 1845 *codified at* 42 U.S.C. § 2000 d.7(a)(1) (West Supp. 1988) .. 7, 12
20 U.S.C.A. § 1400 *et seq.* (West 1978 & Supp. 1988) 2
20 U.S.C. § 1400(b) (West Supp. 1988) 13
20 U.S.C. § 1400(c) (West Supp. 1988) 26
20 U.S.C. § 1401 (West 1978) 26
20 U.S.C.A. § 1411 (West 1978 & Supp. 1988) 24
20 U.S.C.A. § 1412 (West 1978 & Supp. 1988) 6, 13, 24, 26, 27
20 U.S.C. § 1414(b)(3) (West 1978) 27
20 U.S.C. § 1414(d) (West 1978) 9
20 U.S.C. § 1415 (West 1978 & Supp. 1988) 13
20 U.S.C.A. § 1415(b)(2) (West 1978) 19
20 U.S.C.A. § 1415(c) (West 1978) 19
20 U.S.C.A. § 1415(d) (West 1978) 20
20 U.S.C.A. § 1415(e) (2) (West 1978) 2
20 U.S.C. § 1415(f)(4) (West Supp. 1978) 16
42 U.S.C. § 6000 *et seq.* (West Supp. 1978) 4
42 U.S.C. § 6042 (West Supp. 1978) 4
34 C.F.R. § 300.510 (1987) 19-20, 28

State Statutes and Regulations

Hawaii Rev. Stat. § 298-2 (1988) 8
N.Y. Comp. Codes R. & Regs., tit.8, § 200.9 (1987) .. 25
N. Y. Educ. L. § 4402(2)(b) (McKinney's Supp. 1988). 10, 25
N.Y. Educ. Law § 4404 (McKinney 1981 & Supp. 1988) 25
N.Y. Educ. Law § 4408 (McKinney Supp. 1988) 25
Pa. Stat. Ann. tit. 24, § 13-1376 (Purdon Supp. 1988).. 25
Pa. Stat. Ann. tit. 24, § 13-1377 (Purdon Supp. 1988).. 25

PAGE

Other Authorities

Brief of Respondent, *Burlington School Comm.* v. *Dept. of Educ.*, 471 U.S. 359 (1985) (available on LEXIS) 11

132 Cong. Rec. S15104-5 (daily ed. Oct. 3, 1986) ... 14-15

S. Conf. Rep. No. 455, 94th Cong. 1st Sess., *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425 *et seq.* 20

S. Rep. No. 168, 94th Cong., *reprinted in* 1975 U.S. Code Cong. & Ad. News 1433. 13

S. Rep. No. 388, 99th Cong., 2d Sess. (1986) 14

U.S. Department of Education, *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 1987 9

U.S. Department of Education, Office of Special Education, Division of Assistance to the States, Revised DAS Bulletin #107, *reprinted in* [1987-87 Transfer Binder, EHA Rulings/Policy Letters] Educ. Hand. L. Rep. 203:19 (Jan. 16, 1984) 22, 23, 29

U.S. Department of Education, Office of Special Education, "Number of Children 0-20 Years Old Served under Chapter 1 of ECIA (SOP) by Handicapping Conditions," October 1, 1988 9

No. 87-1855

IN THE

Supreme Court of the United States

October Term, 1988

THOMAS K. GILHOOL

Petitioner,

v.

RUSSELL A. MUTH, JR., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMERICAN COUNCIL OF THE BLIND, AMERICAN SOCIETY FOR DEAF CHILDREN, CHILDREN'S DEFENSE FUND, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, MENTAL HEALTH LAW PROJECT, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL MENTAL HEALTH CONSUMERS ASSOCIATION, UNITED CEREBRAL PALSY ASSOCIATIONS, INC., UNITED CEREBRAL PALSY OF NEW YORK CITY, AND WESTERN NEW YORK DISABILITY LAW COALITION AS AMICI CURIAE

INTEREST OF AMICI

Because this case raises important questions concerning the protection of rights expressly secured by Congress through

the Education of the Handicapped Act, the following organizations have a strong interest in participating as *amici*.[1]

The American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members, dedicated to defending the principles embodied in the Bill of Rights. The ACLU of Pennsylvania is one of its affiliates. The ACLU and its affiliates have a deep and continuing interest in protecting the constitutional and statutory rights of disabled individuals, including rights secured by the Education of the Handicapped Act, 20 U.S.C.A. § 1400 *et seq.* (West 1978 & Supp. 1988) (EHA). In order to secure the rights of disabled individuals, the ACLU has represented parties in *Smith* v. *Robinson,* 468 U.S. 992 (1984), *O'Connor* v. Donaldson, 422 U.S. 563 (1975) and the Willowbrook case, *New York State Ass'n for Retarded Children* v. *Carey,* 393 F. Supp. 715 (E.D.N.Y. 1975). The ACLU has appeared *amicus curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982).

American Council of the Blind (ACB), founded in 1961, is a non-profit organization committed to advancing social, economic and educational opportunities for blind and visually impaired Americans. Council members are blind, visually impaired and fully sighted individuals who come from all walks of life but share a common concern: the dignity and well-being of blind people. ACB strives, through a variety of programs and services, to enable blind people to live and work independently, to become active in their communities and to become participants in the democratic process. ACB has chapters in every state/region in the United States and 20

---

1. The parties have consented to the filing of this brief. Letters so indicating have been filed with the Clerk of the Court.

special interest affiliated organizations which focus on the unique concerns of blind professionals and other special populations. ACB is especially concerned about appropriate education, which is essential for blind people to achieve independence.

The American Society for Deaf Children (ASDC) is the only non-profit organization in the United States that has as its mission providing information and support to families with deaf or hard of hearing children, especially in the area of education. It has over 20,000 members through its membership and 125 affiliates throughout the country.

The Children's Defense Fund seeks to provide a strong and effective voice for the children of America. It pays particular attention to the needs of poor, minority and handicapped children. The Children's Defense Fund provides research and information on key issues to the public, monitors federal and state policies, and litigates selective cases. The Children's Defense Fund has had a long-standing interest in the education of handicapped children and was instrumental in the passage of the EHA. It has participated *amicus curiae* in *Board of Education* v. *Rowley*, 458 U.S. 176 (1982).

The Disability Rights Education and Defense Fund (DREDF) is a national disability civil rights organization dedicated to securing equal citizenship for disabled Americans. DREDF is run by and for disabled adults and parents of disabled children. DREDF engaged in numerous activities to secure equal educational opportunities for disabled children, including representing parents and their disabled children in administrative and judicial proceedings under the EHA.

The Mental Health Law Project (MHLP) is a Washington based non-profit organization that advocates on behalf of mentally disabled adults and children. It has long been

involved in efforts to promote appropriate special education for handicapped children. MHLP has appeared *amicus curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982) and *Honig* v. *Doe,* 108 S.Ct. 192 (1988).

The National Mental Health Consumers' Association was organized in Baltimore, Maryland, as a national representative voice for mental health consumers and charged with developing national forums to voice the concerns of mental health consumers. It has more than 5,000 members, including many present and former patients, their families and friends, as well as advocates for the mentally ill. Education is a primary concern of the National Mental Health Consumers' Association since many children who are mental health consumers need special education. The National Mental Health Consumers' Association has appeared as *amicus curiae* in *United States Department of the Treasury* v. *Galioto,* 471 U.S. 556 (1986) and *Colorado* v. *Connelly,* 479 U.S. 157 (1986).

The National Association of Protection and Advocacy Systems, Inc. (NAPAS) is the national association of 55 state and territorial-wide protection and advocacy systems for the developmentally disabled, which are established under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6001 *et seq.* (West Supp. 1988). NAPAS members are charged with pursuing legal, administrative, and other appropriate remedies to insure the protection of rights of mentally retarded and developmentally disabled persons. 42 U.S.C. § 6042 (West Supp. 1988). Problems that mentally retarded and developmentally disabled children encounter in obtaining the "free appropriate public education" required under the EHA constitute a major area of continuing activity for NAPAS.

United Cerebral Palsy Associations, Inc. ("UCPA") is a national organization with some 180 affiliates, formed in

1948 to promote the interests and well-being of persons with cerebral palsy and to establish and assist state and local affiliates in providing direct services, conducting public and professional education and advocacy programs, and supporting research. The assurance of an appropriate education and of the due process rights guaranteed by the EHA is an integral part of its mission. United Cerebral Palsy of New York City, Inc. ("UCP/NYC") is the largest UCP affiliate in the State of New York, and has had substantial experience wih the implementation of EHA mandates in New York State. UCP/NYC has a particular interest in the questions at issue in this case because New York is one of only three states which allow the Commissioner of Education to act as review officer in administrative appeals. UCP/NYC has challenged this procedure as a plaintiff in *Louis M.* v. *Ambach,* No. 86-CV-919 (CGC) (N.D.N.Y. filed Aug. 13, 1986), a pending class suit which concerns primarily the placement of handicapped children in non-public schools. Both UCPA and UCP/NYC have appeared as *amici curiae* in *Board of Education* v. *Rowley,* 458 U.S. 176 (1982).

The Western New York Disability Law Coalition is a group of private and public interest attorneys, advocates, and organizations that provide representation and assistance to handicapped children and adults in matters affecting their legal rights. Members of the Coalition have represented handicapped students in many administrative and judicial proceedings under the EHA, including *J.G.* v. *Rochester Bd. of Education,* 830 F.2d 444 (2d Cir. 1987) (consent decree achieved correcting violations of handicapped students' procedural rights); *Gebhardt* v. *Ambach,* (1982-83) Educ. Hand. L. Rep. (CRR) 554:130 (W.D.N.Y. 1982) (class action against New York State Department of Education on behalf of 100 multiple-handicapped blind students attending the New York State School for the Blind); and *Holmes* v. *Sobol,* 690 F. Supp. 154 (W.D.N.Y. 1988).

STATEMENT OF THE CASE

This case presents two significant questions under the Education of the Handicapped Act, 20 U.S.C. § 1400 *et seq.*: first, whether the eleventh amendment bars tuition reimbursement by the state; second, whether Pennsylvania's Secretary of Education is an impartial reviewing officer of appeals from due process hearings under 20 U.S.C.A. § 1415 (West 1978 & Supp. 1988). Under the EHA, Pennsylvania, which receives federal funds pursuant to the Act, must guarantee to each handicapped child in the state a "free appropriate public education." 20 U.S.C.A. § 1412(1) (West 1978), and must establish a system of impartial administrative review procedures through which parents may seek enforcement of this right.

Respondent Muth challenged the local school district's educational plan for his learning disabled and emotionally impaired son through a due process hearing. He then appealed the hearing officer's decision to the Secretary and later filed this action in federal court, as authorized by 20 U.S.C.A. § 1415(e)(2) (West 1978), seeking, among other things, tuition reimbursement for Alexander's attendance at a private school. The district court found Muth entitled to reimbursement because of procedural violations of the Act. The court of appeals found tuition reimbursement an appropriate remedy for the violations of the Act — the lengthy delay in the hearing process and the Secretary's lack of impartiality in reviewing the decision of the hearing officer — and held that the eleventh amendment presented no bar to that relief. *Muth* v. *Central Bucks School Dist.*, 839 F.2d 113 (3d Cir. 1988).

SUMMARY OF ARGUMENT

Tuition reimbursement is an essential remedy to ensure that all handicapped children receive a free appropriate

education as provided in the EHA. *Burlington School Committee* v. *Dept. of Education,* 471 U.S. 359, 369 (1985). If states are not liable for tuition reimbursement, hundreds of thousands of children educated in state schools without local school board involvement will be deprived of tuition reimbursement.

The eleventh amendment does not bar tuition reimbursement against a state. Congress abrogated the states' eleventh amendment immunity in the EHA and in the 1986 amendments to the Rehabilitation Act of 1973, *codified at* 42 U.S.C.A. § 2000d-7(a)(1) (West Supp. 1988).

The Court need not reach the question of whether a chief state school officer may serve as the review officer in special education appeals, because the Court of Appeals found another procedural violation of the EHA, the finality rule, upon which it also based the tuition reimbursement remedy. Petitioner did not seek *certiorari* on that issue.

If the Court reaches the issue, it should hold that a chief state school officer is barred by the EHA from acting as a review officer in individual appeals. Such officers cannot meet the impartiality requirements of the EHA, because they have conflicts with the interests of individuals arising from their fiscal, policy and administrative duties in the state educational system. States have more than adequate means of meeting their supervisory responsibilities under the EHA other than by having chief school officers review individual hearing decisions. Only three states follow such a practice; in the other forty-seven, chief school officers do not act as review officers. The United States Department of Education presumes that chief state school officers cannot act as review officers, a presumption that operates as a categorical prohibition absent a clear and convincing rebuttal.

ARGUMENT

I.

TUITION REIMBURSEMENT IS AN ESSENTIAL REMEDY TO INSURE THAT ALL HANDICAPPED CHILDREN RECEIVE A FREE APPROPRIATE EDUCATION.

A. Without a Tuition Reimbursement Remedy, over 250,000 Handicapped Children Will Be Denied the Protection of the EHA

Tuition reimbursement has already been found to be an available remedy under the EHA. In *Burlington School Committee* v. *Dept. of Education*, 471 U.S. 359, 369 (1985), this Court approved tuition reimbursement, making no distinction whether payment comes from a state or a local education agency. The Court emphasized the importance of the tuition reimbursement remedy to effectuate the purposes underlying the EHA. Without it, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards [of the Act] would be less than complete." *Id.* at 370.

Full enforcement of the EHA can only be achieved if tuition reimbursement is available from the states. A local school board will not always be available to pay the tuition. In a significant number of cases, a state — not a local school board — is the party opposing a parent's challenge under Act. In at least one state, Hawaii, there are no local school districts and education is provided directly by the state agency. Hawaii Rev. Stat. § 298-2 (1988). Many states, including Pennsylvania, operate schools for the blind and deaf, and others provide educational services under the Act for children institutionalized in facilities for the mentally retarded and

developmentally disabled. Often, the most severely handicapped children attend schools directly operated by states rather than by local school districts. In 1987-88, some 250,000 handicapped children,[2] approximately 6% of the total number of children receiving education under the Act,[3] attended such schools.

As petitioner acknowledges, Petitioner's Brief (Pet. Br.) at 71, Congress was aware that state agencies directly provide educational services to some children, and the statute explicitly recognizes this. *See* 20 U.S.C. § 1414(d)(West 1978). In Pennsylvania, for example, there are five special schools at which the Commonwealth directly provides educational services and directly participates in the development of individual educational plans. Pet. Br. at 71. If Pennsylvania were not liable for tuition reimbursement, children deprived of an appropriate educational opportunity by these special state schools would be denied an essential remedy identified in *Burlington*.

Disputes between parents and states providing educational services can arise in a number of contexts. A state school may deny a handicapped child admission or may expel a handicapped child, forcing the parent to make a private placement and incur tuition expenses while challenging the state's decision through administrative and, if necessary, judicial

---

2. U.S. Department of Education, Office of Special Education, "Number of Children 0-20 Years Old Served under Chapter 1 of ECIA (SOP) by Handicapping Condition," October 1, 1988.

3. In 1985-86, there were a total of 4,370,244 handicapped children nationwide. U.S. Dept. of Educ., *Ninth Annual Report to Congress on the Implementation of the Education of the Handicapped Act*, 1987, at 2-3.

review. Since the local school board is in no way involved in the decision, and indeed may have recommended the state school placement, imposition of tuition costs on the local school board would be inappropriate. *See, e.g., Robert D.* v. *Sobol,* 688 F. Supp. 861, 867 (S.D.N.Y.), *appeal dismissed,* No. 88-7444 (2d Cir. 1988).

Similarly, a state school may develop an individualized educational program (IEP) for a currently enrolled child that the parents believe is inappropriate. If the parents incur tuition expenses to provide the child with an appropriate program at another school, and are unable to recover tuition reimbursement if they successfully challenge the state's actions, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not... be reimbursed..." *Burlington,* 471 U.S. at 370.

Finally, many handicapped children are educated in private schools at public expense, because there is no appropriate placement in the public schools. In some states the state educational agency must approve any private school placement, even when the IEP developed by the parents and the local school board calls for a private school placement. *See, e.g.,* N.Y. Educ. L. § 4402(2)(b) (McKinney's Supp. 1988). If the state rejects the private placement provided for in the IEP, and the parent pays the tuition, it is only appropriate that the state be responsible for reimbursement.

The EHA was intended to provide a free appropriate public education to all children, regardless of whether they attend schools operated by the state or by their local school district. This explicit mandate cannot be fully realized unless the remedies available under the Act apply with equal force to state educational agencies and to local school boards.

B. Tuition Reimbursement Furthers, Rather than Frustrates, the Central Goals of the EHA.

The policy underlying the tuition reimbursement remedy was clearly articulated in *Burlington* only four years ago and should not be reexamined here. Tuition reimbursement is not a "damage remedy," as petitioner contends. Pet. Br. at 50, 52, 53, 54. Rather, it merely requires payment of expenses that an educational agency "should have paid all along and would have borne in the first instance had it developed a proper IEP." *Burlington*, 471 U.S. at 371.

Pennsylvania's view of tuition reimbursement as in some sense punitive is not a position shared by all states. In *Burlington* the prevailing respondent, the Commonwealth of Massachusetts, advocated the availability of tuition reimbursement. The Commonwealth argued that reimbursement is the "only meaningful remedy for the parents who paid for an appropriate private school placement . . . ," and "ensures that the overriding objective of providing education that is both free and appropriate, is met." Brief of Respondent, *Burlington School Comm.* v. *Dept. of Educ.*, 471 U.S. 359 (1985) (available on LEXIS at 18, 19). Moreover, "reimbursement serves another purpose underlying the EHA, encouraging parental participation in educational decisions . . ." *Id.* at 20.

These policy considerations persuaded this Court that tuition reimbursement was an appropriate remedy under the Act. The competing policy considerations enunciated by the petitioner here are no different than those this Court rejected in *Burlington*.

II.

THE ELEVENTH AMENDMENT DOES NOT BAR TUITION REIMBURSEMENT

Congress abrogated the states' eleventh amendment immunity in enacting the EHA by making the states primarily responsible for providing education under the Act. Rather than elaborating on congressional abrogation in the EHA, an issue that Respondent Muth has thoroughly explored, *amici* address two additional bases for concluding that Congress intended to make states liable for tuition reimbursement, notwithstanding the eleventh amendment.

A. The 1986 Amendments to the Rehabilitation Act Demonstrate Congress' Intent To Abrogate States' eleventh amendment Immunity for Violations of the EHA.

Congressional intent in the language of the EHA to abrogate the eleventh amendment immunity was made clear with the enactment of the 1986 Amendments to the Rehabilitation Act of 1973. Pub. L. 99-506, § 1003(a)(1), 100 Stat. 1845, *codified at* 42 U.S.C. § 2000d- 7(a)(1) (West Supp. 1988) provides:

> A State shall not be immune under the eleventh amendment of the Constitution of the United States from suit in Federal court for a violation of section 794 of Title 29 ... *or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance* (emphasis added).

Under this amendment, two requirements for a finding of abrogation within a statute are set forth: receipt of federal

financial assistance, and a prohibition against discrimination. The first is clearly satisfied: states' obligations under the EHA are contingent on receipt of federal financial assistance, 20 U.S.C.A. §§ 1412, 1415 (West 1978), and Pennsylvania receives such funds.

The EHA is an anti-discrimination statute within the meaning of the Rehabilitation Act amendment. Congress adopted the EHA to remedy the discrimination that had denied many handicapped children a free public education. The preamble to the Act states that, "one million of the handicapped children in the United States are excluded entirely from the public school system..." 20 U.S.C.A. § 1400(b)(4) (West Supp. 1988). The language of the Act itself reflects Congress' purpose to "assist State and local efforts to provide programs to meet the educational needs of handicapped children *in order to assure equal protection of the law* [emphasis added]." 20 U.S.C. § 1400(b)(9) (West Supp. 1988). "The guarantee of equal protection . . . is . . . a right to be free from invidious discrimination . . . in governmental activit[ies]." *Harris* v. *McRae*, 448 U.S. 297, 322 (1980).

The legislative history of the EHA provides further evidence that the Act is as a federal statute prohibiting discrimination by recipients of federal funds. The Senate Report states that: "[i]t is this Committee's belief that the Congress must take a more active role under its responsibility for *equal protection of the laws* to guarantee that handicapped children are provided equal educational opportunity... [The statute] takes positive necessary steps to ensure that the rights of children and their families are protected." S. Rep. No. 168, 94th Cong., *reprinted in* 1975 U.S. Code Cong. & Ad. News 1433 (emphasis added).

The deliberations over the 1986 Rehabilitation Act amendments reveal that Congress intended to abrogate states'

eleventh amendment immunity in situations such as this, where otherwise, a local entity but not a state entity would be liable for the same type of violation. The Senate Report, for example, criticized this Court's decision in *Atascadero State Hospital* v. *Scanlon*, 473 U.S. 234 (1985), holding that there was no congressional intent in the Rehabilitation Act to abrogate immunity:

> [*Atascadero*] misinterpreted congressional intent. Such a gap in Section 504 coverage was never intended. It would be inequitable for Section 504 to mandate state compliance with its provisions and yet deny litigants the right to enforce their rights in Federal courts when State or State agency actions are at issue. S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986).

The remarks of Senator Cranston, who sponsored the Rehabilitation Act amendments, demonstrate that Congress clearly intended the abrogation provision to apply to suits against state agencies for discriminating against handicapped individuals in the provision of education:

> As a result of the Court's decision [in *Atascadero*] a disabled individual who has suffered unfair discrimination at the hands of a State agency has two choices—a suit in State court for damages or injunctive relief, or both, or Federal suit for an injunction against individual State officials. Those choices are not adequate. As to the limit on Federal remedies, litigation involving a claim of discrimination often takes years to resolve. Thus, where the disabled person is seeking employment or *is trying to pursue an education* . . . an injunction may come too late to be a value in remedying the harm done through the

> unlawful discrimination. 132 Cong. Rec. S15104-5 (daily ed. Oct. 3, 1986) (emphasis added).

Indeed, the legislative history reflects Congress' intent to reverse the presumption against abrogation enunciated in *Atascadero,* with respect to statutes proscribing discrimination against handicapped persons. Senator Cranston stated, for example, "as a result of this legislation, if a federal suit for damages were generally available to enforce a civil rights law against a recipient of Federal funds—and nothing in that law were to exempt the States from such a suit—a Federal suit for damages would now be available against a state or a State agency." 132 Cong. Rec. S15105 (daily ed. Oct. 3, 1986). The amendments to the Rehabilitation Act thus represent a congressional effort to authorize remedies such as tuition reimbursement, for *all* handicapped students under the EHA.

B. Tuition Reimbursement Actions Against State Agencies Are Authorized under the Rehabilitation Act Amendments and a Bar to Such Actions under the EHA Would Be Futile.

Petitioner urges this Court to preserve the "fundamental values of sovereign immunity" by holding that the eleventh amendment bars tuition reimbursement under the EHA. *See,* Pet. Br. at 39. Were this court to so hold, however, tuition reimbursement would remain an available remedy under the Rehabilitation Act. Thus, an eleventh amendment bar to tuition reimbursement claims under the EHA will not vindicate any state interest in sovereign immunity.

In *Smith* v. *Robinson,* 468 U.S. 992 (1984), this Court established the EHA as the sole vehicle for remedying claims of the denial of a free appropriate public education. *Smith* held that Congress, in enacting § 504 "did not intend a handicapped child to be able to circumvent the requirements or

supplement the remedies of the [EHA] by resort to the general antidiscrimination provision of § 504 of the Rehabilitation Act, 29 U.S.C. § 794." *Id.* at 1018.

In 1986, however, Congress effectively overruled this Court's decision in *Smith*, by adding 20 U.S.C. § 1415(f),[4] which preserves a right of action under the Constitution and the Rehabilitation Act for claims involving the denial of a free appropriate public education. "The new § 1415(f) states that the provisions of the EHA do not provide the exclusive avenue for redress available to handicapped children, and that § 504 of the Rehabilitation Act of 1973 ... may be used ... to enforce EHA educational rights..." *Mrs. W.* v. *Tirozzi*, 832 F. 2d 748, 751 (2d Cir. 1987); *See also Digre* v. *Roseville Schools Independent School District No. 623*, 841 F. 2d 245 (8th Cir. 1988); *Martinez* v. *School Board of Hillsborough*, 861 F. 2d 1502 (11th Cir. 1988). Since there is no eleventh amendment bar to tuition reimbursement claims under section 504, parents may alternatively recover tuition reimbursement from the state under section 504.

As a result, if petitioner were to prevail, the remedy that this Court identified in *Burlington* as so important to the effectuation of the EHA will be available by resort to a more generalized statute, the Rehabilitation Act, but not under the EHA itself. Congress could not have intended such an absurd result. The availability of tuition reimbursement from a state

---

4. 20 U.S.C § 1415(f) (West Supp. 1988) provides, in relevant part:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of handicapped children and youth ...

under section 504 further indicates Congress intended to abrogate the eleventh amendment immunity for violations of the EHA.

III.

THIS COURT NEED NOT REACH THE QUESTION OF WHETHER A CHIEF STATE SCHOOL OFFICER MAY SERVE AS THE REVIEW OFFICER IN SPECIAL EDUCATION APPEALS.

This Court need not rule on the second question presented: whether the chief state school officer[5] is barred from serving as the review officer in special education appeals. The court of appeals found two violations of the procedural requirements of the EHA: first, the Secretary's remand of the proceeding denied respondent a final decision; and second, the Secretary's role as state-level review officer deprived respondent of an impartial administrative appeal. While the court of appeals based its affirmance of tuition reimbursement primarily on Pennsylvania's violation of the finality requirement, *Muth* v. *Central Bucks School Dist.*, 839 F.2d 113, 127 (3d Cir. 1988),[6] the Secretary did not seek *certiorari* on the question of whether the remand violated the Act. *Gilhool* v. *Muth*, 56 U.S.L.W. 3839 (U.S. June 7, 1988) (No. 87-1855) (questions presented). *See also Gilhool* v. *Muth, cert. granted*, 109 S.Ct. 52 (1988).

---

5. The term "chief state school officer" is used to refer to the chief executive of a state educational agency, such as Petitioner Gilhool.

6. Significantly, the district court did not even address the issue of impartiality in its decision awarding tuition reimbursement. *Muth* v. *Smith, slip op.* (E.D. Pa. Aug. 28, 1986).

It was the remand by the Secretary that prevented Muth from obtaining a timely review decision, and as a result, Muth unnecessarily incurred tuition expenses. Thus, regardless of any decision by this Court on the issue of the Secretary's impartiality, an unchallenged violation of the EHA survives, for which tuition reimbursement was awarded. A reversal by this Court on the impartiality issue would not require the court of appeals to reexamine its holding on the remand issue. Therefore, the only question necessarily before this Court is whether the relief awarded by the Court of Appeals comports with eleventh amendment.

IV.

AS A MATTER OF LAW, THE EHA PRECULDES A CHIEF STATE SCHOOL OFFICER FROM SERVING AS REVIEW OFFICER IN SPECIAL EDUCATION APPEALS.

This Court has recognized that the EHA's procedural protections are of paramount importance in insuring that appropriate educational opportunities are provided to handicapped children:

> When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. *Board of Educ.* v. *Rowley*, 458 U.S. 176, 205-06 (1982).

See also Honig v. Doe, 108 S.Ct. 592, 198 (1988); *Burlington*, 471 U.S. at 368-69 (1985); *Smith* v. *Robinson*, 468 U.S. 992, 1010-11 (1984).

A chief state school officer should not and need not personally decide special education appeals in order for the officer to properly carry out his supervisory functions under the EHA. In forty seven states, the state education agency executive does not decide individual special education appeals.[7] Only in Pennsylvania, New York and Minnesota do the chief state school officers review appeals from hearing decisions. Thus, a ruling by this Court barring chief state school officers from reviewing appeals would require only three states to change their laws and procedures.

A. The EHA's Procedural Structure Precludes a Chief State School Officer from Serving as an Impartial Review Officer

An impartial review officer is an essential element of the procedural safeguards set forth in the EHA. In order to ensure impartial decision-making in the administrative process, the EHA prohibits an employee of an agency "involved in the education or care of the child" from serving as hearing officer in an initial due process hearing, whether held at the local or state level. 20 U.S.C.A. § 1415(b)(2) (West 1978). If a state elects a two-tiered administrative process, the EHA requires that a state-level review of a local hearing decision also be impartial and that the review officer make an independent decision based on the record. 20 U.S.C.A. § 1415(c) (West 1978).

Since a state-level review may be converted into a "hearing" for the taking of additional evidence, 34 C.F.R.

---

7. Appendix A is a chart of the special education review systems of the fifty states and the District of Columbia.

§ 300.510 (1987), the standards of impartiality which apply to a first-level hearing officer must also apply to a state-level review officer. Congress indicated as much when it referred to both first-level hearings and state-level reviews as "hearings" and stated that both must be conducted in a similar manner and afford parents similar rights. 20 U.S.C.A. § 1415(d) (West 1978). Furthermore, Congress intended that parents have access to an equally impartial administrative remedy whether they reside in a state using a one-tiered or a two-tiered system. Therefore, like a first-level hearing officer, a state-level review officer must be impartial and cannot be an employee of an agency involved in the education of the child.

The EHA's legislative history reveals clear congressional intent that chief state school officers be barred from serving as review officers:

> [N]o hearing may be conducted by an employee of the State or local educational agency involved in the education or care of the child. The conferees have adopted this language to clarify the minimum standard of impartiality which shall apply to individuals conducting due process hearings *and individuals conducting a review of the local due process hearing* ... S. Conf. Rep. No. 455, 94th Cong. 1st Sess. 49, *reprinted in* 1975 U.S. Code Cong. & Admin. News 1425, 1502 (emphasis added).

The original bill, which barred only employees of an agency "directly involved" in the education of the child from serving as hearing officers, was amended by the Conference Committee to eliminate the word "directly." S. Conf. Rep. No. 455, *supra*, at 47-49, *reprinted in* 1975 U.S. Code Cong. & Admin. News at 1500-02. Thus, Congress "intentionally expanded [the EHA's] prohibition to include employees of

state educational agencies not directly involved in the education of the child and to disqualify them from serving as hearing officers." *Robert M.* v. *Benton*, 634 F.2d 1139, 1142 (8th Cir. 1980).[8]

A number of courts have examined this legislative history and have found that Congress intended that the state education agency employees not serve as review officers because they do not meet the Act's impartiality requirements.[9] The two courts that have upheld review by the chief state school officer did not consider the legislative history,[10] and in both

---

8. The Secretary's argument that the specific provisions of the consent decree in *Pennsylvania Ass'n for Retarded Children* v. *Pennsylvania*, 334 F. Supp. 279 (1972) (PARC) should override the express intent of Congress on this point is without merit. This Court recently held that the conspicuous absence in the EHA of a specific provision contained in the *PARC* consent decree is indicative of congressional intent to omit the provision. *Honig* v. *Doe*, 108 S.Ct. at 605.

9. *Muth*, 839 F.2d at 122-24; *Colin K.* v. *Schmidt*, 715 F.2d 1, 5 n.3 (1st Cir. 1983); *Grymes* v. *Madden*, 672 F.2d 321, 323 (3d Cir. 1982); *Helms* v. *McDaniel*, 657 F.2d 800, 806 n.9 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1982) (State Board of Education); *Holmes* v. *Sobol*, 690 F. Supp. 154, 160 (W.D.N.Y. 1988) (Commissioner of Education); *Vogel* v. *School Bd. of Montrose*, 491 F. Supp. 989, 995 (W.D. Mo. 1980) (Deputy Commissioner of Education). *See also Robert M.*, 634 F.2d at 1141-42 (chief state school officer "statutorily disqualified" from serving as hearing officer even though state educational agency does not directly provide educational services); *Mayson* v. *Teague*, 749 F.2d 652, 657-59 (11th Cir. 1984) (univeristy personnel involved in developoment of state educational policies may not serve as hearing officers); *Kotowicz* v. *Mississippi St. Bd. of Educ.*, 630 F. Supp. 925 (S.D. Miss. 1986) (applying *Mayson* to state-level review officers).

10. *Victoria L.* v. *District School Bd. of Lee Co.* 741 F.2d 369, 374 (11th Cir. 1984); *Brandon E.* v. *Wisconsin Dept of Pub. Instruction*, 595 F. Supp. 740, 746 (E.D. Wis. 1984).

cases, the state subsequently changed its review system to eliminate the involvement of the chief state school officer in EHA hearings and reviews.[11]

The federal agency charged with enforcing the EHA has interpreted the Act as barring review by a chief state school officer:

> Our review of the express language of the statute, its legislative history and the varied positions taken by different Federal courts has led us to conclude that with respect to the designations of SEA employees, chief state school officers and members of State boards of education a presumption arises under the Act that such persons are involved in the education and care of all handicapped children in the state and, thus, are generally precluded from serving as state level review officials under section 615(c). Absent a clear and convincing rebuttal, this preusmption operates as a categorical prohibition. U.S. Department of Education, Office of Special Education, Divison of Assistance to the States, Revised DAS Bulletin #107, *reprinted in* [1987-87 Transfer Binder, EHA Rulings/Policy Letters] Educ. Hand. L. Rep. 203:19 (Jan. 16, 1984) (DOE Bulletin).[12]

As a "construction adopted by the agency charged with monitoring and enforcing the statute," this interpretation is entitled to considerable deference. *See, e.g., Honig*, 108 S.Ct. at 604, n.8; *Chevron, U.S.A., Inc.* v. *Natural*

---

11. *See* Florida and Wisconsin in Appendix A.

12. A copy is reproduced as Appendix B.

Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984).

The DOE Bulletin sets forth factors which may rebut the presumption of bias, which include showings that the review officer was not substantially involved in development of any policy in question at the hearing, is not responsible for the general supervision of education programs for handicapped children and has no personal, economic or professional interest in the outcome of the hearing. DOE Bulletin, EHLR (CRR) [1977-87 Transfer Binder EHA Rulings/Policy letters] 203: 19, 19-20. (Jan. 16, 1984). Absent such a showing, the presumption is conclusive.

In his brief to this Court, the Secretary repeatedly acknowledges that he is "substantially involved" in the development of all state policies regarding the education of handicapped children and that he is responsible for the general supervision of all education in the state, including education programs for handicapped children. Pet. Br. at 65-69, 78-82, 86. While the Secretary asserts these facts as reasons why he *must* serve as review officer in special education appeals, DOE has determined that such involvement in policymaking and general supervision are the very factors which prevent a chief state school officer from being completely impartial in an individual special education appeal.

B. Chief State School Officers Have Fiscal, Policy and Supervisory Responsibilities Inconsistent with the Role of Impartial Review Officer.

Congress mandated a higher standard for impartiality for hearing and review officers in the EHA than the "rudimentary" constitutional due process requirements set forth in *Goldberg* v. *Kelly*, 397 U.S. 254, 267, (1970). Although *Goldberg* barred only those adjudicators who "have

participated in making the determination under review," *id.* at 271, Congress intended to further insulate the EHA hearing and review process from the possibility of conflict of interest. *See Helms* v. *McDaniel*, 657 F.2d 800, 805 n.8 (5th Cir. 1981), *cert. denied*, 455 U.S. 946 (1946) (EHA's impartiality requirements are greater than those that satisfy constitutional due process). Congress recognized that the state educational agency is involved in the education of all handicapped children in the state because the state educational agency funds most of the state's special education programs and sets educational policy for the state. The pervasive role of the state educational agency in the special education program creates conflicts of interest which are contrary to notion of impartial decisionmaking.

The conflict of interest is most apparent in the fiscal context. States that accept federal funding under the EHA are obligated to provide appropriate educational services to all handicapped children, 20 U.S.C.A. § 1412 (West 1978 & Supp. 1988), using state funds in addition to federal funds received under the EHA.[13] The bulk of the monies used to finance special education comes from the states. In 1986 Pennsylvania spent approximately 447 million dollars of state funds and only 59 million dollars of federal funds on special education. Pet. Br. at 51, n.11.

State educational agencies often pay a higher proportion of special education costs than local school districts for certain programs pursuant to state statutes. For example, the

---

13. Under the EHA, the federal allocation to the state represents only a percentage of the total cost of educating a child. 20 U.S.C.A. § 1411 (West 1978 & Supp. 1988).

Commonwealth of Pennsylvania is statutorily responsible for eighty percent of the cost of a private placment such as that originally sought by respondent Muth. Pa. Stat. Ann. tit. 24, § 13-1376-1377 (Purdon Supp. 1988). *See also* N.Y. Educ. Law § 4404 (McKinney 1981 and Supp. 1988); N.Y. Comp. Codes R. & Regs., tit. 8, § 200.9 (1987). In New York, as in some other states, the State Commissioner of Education must approve all private placmeents even though the parents and the local school district agree that a private placement is appropriate and the individual education plan so provides. N.Y. Educ. Law. §4402(2)(b) (McKinney's Supp. 1988). *See also* Pa. Stat. Ann., tit. 24, §§13-1376(a) (Purdon Supp. 1988). If the Commissioner disapproves the placement, the parents must seek an impartial hearing). which may be followed by review by the Commissioner of his own decision denying the *private placement.*[14] *See Robert D.* v. *Sobol,* 688 F. Supp. 861 (S.D.N.Y. 1988), *appeal dismissed,* No. 88-7444 (2d Cir 1988); *Michael M.* v. *Board of Education,* 686 F. Supp. 995 (E.D.N.Y. 1988).

The fiscal conflict of interest is also illustrated in New York, where the Commissioner of Education, rather than the local school district, pays 90% of the cost of summer educational services for handicapped children. N.Y. Educ. Law § 4408 (McKinney's Supp. 1988). In *Holmes v.* Sobol, 690 F. Supp. 154 (W.D.N.Y. 1988), the Commissioner reversed a decision of the impartial hearing officer granting summer services. The federal district court then granted preliminary

---

14. A class action challenging this procedure is presently pending in the Northern District of New York, *Louis M.* v. *Ambach,* 86-CV-919 (CGC) (filed Aug. 13, 1986). *Amicus* United Cerebral Palsy of New York City is a plaintiff in that action.

relief overruling the Commissioner, finding a likelihood of success on the merits on the argument that the Commissioner lacked impartiality.

A conflict of interest also may occur when a state educational policy conflicts with the individualized needs of a particular child. For example, some states have established a state-wide system of providing many special educational programs on a regional basis, rather than by making appropriate accommodations in the handicapped child's home school. In some cases, regional schools are separate facilities for the handicapped, creating a conflict between state policy and the child's EHA right to be educated in the least restrictive environment, 20 U.S.C. § 1412(5)(West 1978). *See, e.g., Tessar* v. *Mounds View Indep. School Dist.*, No. 3-88-342 (D.Minn. filed May 25, 1988) (action challenging the Commissioner's impartiality where he reversed a hearing officer's decision awarding home school rather than regional school placement).

Congress intended in the EHA to insure *individualized* decision-making for each handicapped child and to insure that each child's program is based on the child's needs. 20 U.S.C. § § 1400(c) (West Supp. 1988), 1401(18),(19) (West 1978). The Secretary's insistence on combining the state educational agency's rule-making, enforcement and adjudicating functions by personally ruling in individual special education appeals interferes with the impartiality of the adjudicatory process.[15]

---

15. The United States Department of Education has determined that a "professional" conflict of interest disqualifies a person from acting as a state level review officer. *See* Appendix B. A person who has been involved in development of state policy has a professional conflict of interest. *Mayson* v. *Tegue*, 728 F.2d 652, 658-59 (11th Cir. 1984).

C. The Secretary Can Carry Out His Monitoring and Enforcement Responsibilities under the EHA without Serving as Review Officer

States have many other means of meeting their supervisory obligations under the EHA, 20 U.S.C. § 1412(6) (West 1978), which include rule-making, site visit monitoring, disseminating manuals and curricula, training educational personnel, providing technical assistance, and, in extreme cases, cutting off funds to schools and school districts. In addition to these activities, the state educational agency is required by the EHA to "consider any decision [resulting from a due process proceeding] which is adverse to the local educational agency or intermediate educational unit involved in such decision." 20 U.S.C. § 1414(b)(3) (West 1978). This statutory language alone is sufficient to indicate that Congress did not contemplate that the chief executive officer of the state educational agency would be making the decisions in these individual cases. Rather, Congress' purpose was to insure that the state educational agency would be aware of rulings being handed down in individual cases so that it could take appropriate corrective measures if the decisions revealed that actions of local school districts or the state educational agency itself were found improper under the EHA.

Thus, the Secretary can further all of the interests on which he bases his need to serve as review officer by engaging in appropriate monitoring and training activities. It is not necessary for him to issue each review decision himself, and, in view of his potential conflict of interest in the out-

come of such cases, it is also improper and prohibited by the EHA.

V.

SHOULD THE COURT FIND THAT THE EHA DOES NOT BAR A CHIEF STATE SCHOOL OFFIIER FROM SERVING AS REVIEW OFFICER AS A MATTER OF LAW, THE COURT SHOULD REMAND THIS CASE FOR DEVELOPMENT OF THE RECORD ON THE SECRETARY'S IMPARTIALITY

If there is any question as to whether the EHA bars the chief state school executive from serving as review officer as a matter of law, this Court should remand this case for development of the factual record. There are significant factual findings that would assist this Court in determining the Secretary's impartiality. In this case, however, there is no factual record on the actual practices and procedures utilized by Secretary Gilhool in conducting state-level reviews.

Among the factual issues that would be significant in resolving the question of the Secretary's impartiality are: whether the Secretary was involved in developing policies that relate to the issue in this case; whether the Secretary takes into account the state educational agency's budgetary concerns in reviewing relief awarded by hearing officers; whether the Secretary has engaged in a pattern of reversing decisions that award a particular type of relief, (for example, private school placement); whether certain state educational policies unrelated to the EHA (for example, to promote full utilization of school buildings) are considered by the Secretary in his EHA review function; whether the Secretary reviews the entire record of the hearing as specifically required by the Act (34 C.F.R. § 300.510) (1987); and

whether the Secretary considers matters outside of the administrative record without notice to the parties.[16]

In the two other states where the chief executive officer of the state educational agency reviews hearing decisions—New York and Minnesota—actions are pending which challenge the officer's impartiality. *See Holmes* v. *Sobol*, 690 F. Supp. 154 (W.D.N.Y. 1988); *Tessar* v. *Mounds View Indep. School Dist.*, No. 3-88-342 (D.Minn. filed May 25, 1988). In both cases, the parties are engaging in discovery to address the factual issues noted above.[17]

---

16. Indeed, the Secretary's assertion that he "combine[s] both policymaking and implementing functions" with his review of individual appeals (Pet. Br. at 65) raises serious, but unexplored questions concerning his impartiality. The DOE Bulletin, discussed *supra* and attached as Appendix B, indicates that such a combination of functions constitutes a violation of the EHA.

17. Conversations with Elizabeth Lottman Schneider, attorney for Adam Holmes and counsel for *amici* here, and with Lawrence J. Ringer of Mid-Minnesota Legal Assistance, Inc., attorney for Molly Tessar.

CONCLUSION

For the reasons stated above, the decision of the United States Circuit Court for the Third Circuit should be affirmed.

Respectfully submitted,

MINNA J. KOTKIN*
KATHLEEN A. SULLIVAN
Brooklyn Law School
One Boerum Place
Brooklyn, New York 11201

ELLEN M. SAIDEMAN
HERBERT SEMMEL
New York Lawyers
for the Public Interest, Inc.
135 East 15th St.
New York, New York 10003

ELIZABETH LOTTMAN SCHNEIDER
Monroe County Legal Assistant Corp.
87 North Clinton Ave., Suite 200
Rochester, New York 14604

Attorneys for Amici Curiae

**Counsel of Record*

January 20, 1989

Counsel acknowledge the assistance of Barbara Liese, a law student intern, and Mark W. Smith, a research assistant.

SPECIAL EDUCATION REVIEW SYSTEMS OF THE FIFTY STATES AND THE DISTRICT OF COLUMBIA

STATE	ONE-TIERED* OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION**
Alabama	one	N/A	Alabama St. Dept. of Educ., Div. of Student Instructional Services, Prog. for Exceptional Children & Youth, Admin. Policy Manual, Bull. No. 36, § 8.4.4 (1986).
Alaska	two	State Board of Education++	Alaska Admin. Code tit. 4, §§ 52.560, .570 (eff. 7/1/83).
Arizona	two	non-SEA employee/ official	Ariz. Comp. Admin. R. & Regs. R7-2-405 (U)(1978).
Arkansas	one	N/A	Ark. Stat. Ann. §6-41-216 (1987); Ark. St. Bd. of Educ., Referral, Placement & Appeal Procedures: Special Education & Related Services (I)(7)(1987).

* All states with one-tiered systems utilize non-SEA employees/officials as hearing officers, with the exception of North Carolina.

** Citations are to the highest level source in which the relevant position is found, in the following order: state statute, state code of regulations, SEA rules or regulations, controlling court orders, SEA policies or bulletins, State Plan Under Part B of Public Law 94-142 (the EHA).

\+ Source cited does not state whether or not SEA employee/official may serve as hearing or review officer, but state's practice is to use non-SEA employee/officials.

++ In Alaska the review is conducted by the State Board of Education, but an independent review officer is appointed if additional evidence is taken during the review.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
California	one	N/A	Cal. Educ. Code § 56505 (West Supp. 1989).+
Colorado	two	non-SEA employee/ official	1989-1990 Colo. St. Plan Under Pt. B of P.L. 94-142, § VII (B)(4) & (5).
Connecticut	one	N/A	Conn. Gen. Stat. Ann. § 10-76h(d) & (e)(West 1986).
Delaware	one	N/A	Del. Code Ann. tit. 14, §§ 3137, 3141 (1986).
District of Columbia	one	N/A	Mills v. Bd. of Educ., 348 F.Supp. 866, 881 (D.D.C. 1972).
Florida	one	N/A	Fla. Stat. Ann. § 230.23 (4)(m)(4)(West Supp. 1989).
Georgia	two	non-SEA employee/ official	Ga. Dept. of Educ., Regs. & Procedures, § II(G) (1988).+
Hawaii	one	N/A	Regs. of Haw. Dept. of Educ., tit. 8, subtit. 2, pt. 1, ch. 36, § 8-36-14 (eff. 1/6/86).
Idaho	two	non-SEA employee/ official	Idaho St. Bd. of Educ., Rules & Regs. Pertaining to Special Educ. & Fed. Regs. Under P.L. 94-142, § 3.11.8.6 (July, 1985).+
Illinois	two	non-SEA employee/ official	Ill. Ann. Stat. ch. 122, para. 14-8.02 (h) (Smith-Hurd Supp. 1988); Ill. Admin. Code tit. 23, § 226.680 (eff. 10/22/86).

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Indiana	two	non-SEA employee/ official	Ind. Admin. Code tit. 511, r. 7-1-3(h)(1)(1984). +
Iowa	one	N/A	Iowa Admin. Code r. 281-41.43,.44 (1988). +
Kansas	two	non-SEA employee/ official	Kan. Stat. Ann. §72-974 (Supp. 1987). +
Kentucky	two	non-SEA employee/ official	707 Ky Admin. Regs. 1:060 (1983) (incorporating St. Bd. of Educ. Due Process Policy & Proc. Manual at 20-22 (July, 1983). +
Louisiana	two	non-SEA employee/ official	Regs. for Implementation of Exceptional Children's Act. R.S. 17: 1941 et seq., Bull. 1706, §§ 510, 514 (1983). +
Maine	one	N/A	Me. Rev. Stat. Ann. tit. 20-A, §7207-B(2) (Supp. 1988). +
Maryland	two	non-SEA employee/ official	Md. Educ. Code Ann. §8-415(b) (Supp. 1988).
Massachusetts	one #	N/A	Mass. Regs. Code tit. 603, §§ 400.0-411.0 (1986).
Michigan	two	non-SEA employee/ official	Mich. Admin. Code r. 340.1725 (1987). +

The appeal from a hearing decision to the State Advisory Committee referred to in the Massachusetts statute and regulations has been eliminated.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Minnesota	two	Commissioner of Educ. or SEA employee designated by the Commissioner	Minn. Stat. Ann. § 120.17(3b)(f) (West Supp. 1989).
Mississippi	two	non-SEA employee/ official	1989-91 Miss. St. Plan Under Pt. B of P.L. 94-142, at 55-56.+
Missouri	two	non-SEA employee/ official	Mo. Ann. Stat. § 162.961(2) (Vernon Supp. 1989).
Montana	one	N/A	Mont. Admin. R. 10.6.103A, 10.6.119A (1988).
Nebraska	one	N/A	Neb. Rev. Stat. §§ 79-3350, -3354 (Reissue 1987).+
Nevada	two	non-SEA employee/ official	Nev. Admin. Code ch. 388, § 388.315 (1988).
New Hampshire	one	N/A	N.H. Code Admin. R. [Educ.] 1127.02 (1988).
New Jersey	one	N/A	N.J. Admin. Code tit. 1, §§ 1:6A - 3.4, 1:6A - 5.3 (1988).
New Mexico	two	non-SEA employee/ official	Educational Standards for N.M. Schools, ch. 3, § B.3.3 (1988).+

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
New York	two	Commissioner of Education	N.Y. Educ. Law § 4404 (McKinney Supp. 1988).
North Carolina	one	N/A	N.C. Gen. Stat. § 115C-116(d) to (i)(Supp. 1988).
North Dakota	one	N/A	N.D. Special Educ. Regs. & Policies, §§ 7.5.5, 7.5.6, 7.5.11.2 (1985).+
Ohio	two	non-SEA employee/ official	Ohio Admin. Code § 3301 - 51 - 02(G)(12)(1982).
Oklahoma	two	non-SEA employee/ official	1988-90 Okla. St. Plan Under Pt. B of P.L. 94-142, at 54.+
Oregon	two	non-SEA employee/ official	Or. Admin. R. 581- 15 105 (2)(b)(1988).
Pennsylvania	two	Secretary of Education	22 Pa. Code § 13.32 (24)(1983).
Rhode Island	two##	non-SEA employee/ official	Regs. of the Bd. of Regents for Elementary & Secondary Educ. Governing the Special Educ. of Handicapped Children, Section One, IX, 10.1 (1986).
South Carolina	two	non-SEA employee/ official	1988-90 S.C. St. Plan Under Pt. B of P.L. 94-142, at 58.

A third level of review, to the Rhode Island Board of Regents, apparently may be used at the option of the parents before proceeding in court.

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
South Dakota	one	N/A	S.D. Admin. R. § 24:05:07:16 (1988). +
Tennessee	one	N/A	Tenn. Comp. R. & Regs. ch. 0520-1-3-. 0 9 (5)(f)(16) (eff. 1987). +
Texas	one	N/A	Texas Admin. Code tit. 19, § 157.97(h)(1988).
Utah	two	non-SEA employee/ official	Utah St. Office of Educ., Special Educ. Rules § V(C)(1)(1988).
Vermont	two	non-SEA employee/ official	Manual of Rules & Practices of the St. of Vt. Bd. of Educ. § 2364.3.6 (1988). +
Virginia	two	non-SEA employee/ official	Regs. Governing Special Educ. Programs for Handicapped Children & Youth in Va., II(C)(1)(k) (eff.1/1/85). +
Washington	one	non-SEA employee/ official	Wash. Admin. Code §§ 392-171-536, -561 (1986). +
West Virginia	two	non-SEA employee/ official	W. Va. Regs. for the Educ. of Exceptional Students, Policy 2419, § 3(I)(2)(eff. 7/1/88).

STATE	ONE-TIERED OR TWO-TIERED SYSTEM	STATE-LEVEL REVIEW OFFICER	SOURCE/CITATION
Wisconsin	two	non-SEA employee/ official***	Wis. Dept. of Pub. Instruction, Information Update, Bull. No. 85.7 (Dec. 1985).
Wyoming	one	non-SEA employee/ official	1988-89 Wyo. St. Plan Under Pt. B of P.L. 94-142, ch. VII, §§ 10(b), 14.

***The Information Update cited changed Wisconsin's system to one using private attorneys as review officers. The Wisconsin statute states that the review is conducted by the State Superintendent of Instruction (Wis. Stat. Ann. § 115.81(7)(West Supp. 1988), but this practice is not followed.

Exhibit B

Revised DAS Bulletin #107

January 16, 1984

INFORMAL LETTER TO CHIEF STATE SCHOOL OFFICERS

SUBJECT: **Qualifications of State Level Reviewing Officials under Part B of the Education of the Handicapped Act (EHA-B)**

During the initial years of administering EHA-B, the Special Education Programs Office (SEP) interpreted section 615(c) of the Act to mean that State education agency (SEA) employees, chief state school officers, and members of State boards of education could serve as reviewing officials under certain circumstances. In recent years, however, questions have arisen about this interpretation.

As case law developed in this area, it became clear that SEP's initial interpretation of section 615(c) should be reconsidered and appropriate clarification made. Our review of the express language of the statute, its legislative history and the varied positions taken by different Federal courts has led us to conclude that with respect to the designations of SEA employees, chief state school officers and members of State boards of educations a presumption arises under the Act that such persons are involved in the education and care of all handicapped children in the state and, thus, are generally precluded from serving as state level review officials under section 615(c). Absent a clear and convincing rebuttal, this presumption operates as a categorical prohibition.

In order to comply with the requirements of section 615(c), it is SEP's position that a State educational agency must

either preclude the designation of SEA employees, chief state school officers and members of State boards of education from serving as state level review official or rebut the presumption described above by demonstrating that the State educational agency has in effect formal written procedures which ensure that accepted standards of procedural fairness and impartiality will be followed in the selection of state level review officials. At a minimum such standards must include.

(1) Any SEA employee or official designated to serve as a state-level review official will be a person who is not and has not been routinely personally involved in decision made by local education agencies regarding any aspect of the identification, evaluation, placement or provision of free appropriate public education to handicapped children in such agencies either before or after such decisions are made;

(2) Any SEA employee or official designated to serve as a state-level review official will be a person who has not in any way been personally involved in any aspect of any decision made by a local school district with respect to the child about whom the hearing is concerned or with respect to similarly situated children in such school district;

(3) Any SEA employee or official designated to serve as a state-level review official will be a person who has not been in any way substantially involved in the development of any state or local policy or procedure which is directly or indirectly being challenged by the hearing;

(4) Any SEA or official designated to serve as a state-level review official will be a person:

(a) who is not, and has not at any time been, employed by the local educational agency or state agency which is a party to the hearings;

(b) who has not participated in the selection of the administrators of such local or state agency; and

(c) who has no personal, economic or professional interest in the outcome of the hearing other than the proper application of Federal and State laws, regulations and policies;

(5) No SEA employee or official will be designated to serve as a state-level review official with respect to any hearing to which the state education agency, any SEA subdivision, or any education program operated by (or provided under a contract or other formal arrangement with) the SEA, is a party;

(6) No SEA employee or official will be designated to serve as a state-level review official with respect to any proceeding which challenges the actions of any employee or official of the state educational agency;

(7) Neither person(s) in the state educational agency responsible pursuant to Section 612(b) of the Act for the general supervision of education programs for handicapped children nor any members of such person's staff may serve as a state-level review official; and

(8) A parent or other guardian of a handicapped child who is a party to a state-level review may formally challenge the impartiality of any proposed state-level review official on the basis of any of the standards listed in criteria (1)-(7) above.

This interpretation of the statute directly affects the EHA-B State plans in a number of states that have State review of local level hearings; and it may require some States to seek legislative change in their policies and procedures. A transition period will be allowed for states that are affected, based on procedures set out below:

If a State's EHA-B plan for FY 1984-86 does not include procedures that are consistent with the above interpretation, SEP will accept amended procedures submitted to SEP no later than June 30, 1984 to be implemented in the State no later than October 1, 1984.

If a State submits these procedures as an amendment to its FY 1984-86 plan, the public participation requirements in the EDGAR and EHA-B regulations must be met, because the revised procedures constitute a significant change in the plan.

Submission of procedures that are consistent with the above interpretation is one of the conditions that must be met in order for a State to receive its EHA-B grant for the fiscal year 1985.

An exception to the above transition period must be made in any State that is directly affected by a judicial ruling on this issue. In such a case, the State's FY 1984-86 plan must include due process procedures that are consistent with the court's ruling, in order for the plan to be approved.

If you have any comments or questions about this letter, or if our Office can be helpful in any way in revising your state level review procedures, please contact Dr. David Rostetter, Acting Director, Division of Assistance to States. ((202) 472-3796)

GARRY L. MCDANIELS
Director
Office of Special Education Programs